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**COLLEGE
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T H E S I S

The Law and Daily Living

by

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(B.B.A. Boston University 1919)
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A The Personal Note.

I A Letter to my critics--those who sit in University Halls and wonder what a woman knows about law anyway, wonder what value a collection of such letters could be to the man of business, the man in the profession, or the man of the street, and surely question the ability of the man's family, particularly the female portion of his household, to absorb, to understand, or be helped by abstract knowledge of legal principles.

1. The world situation.
2. The attitude in our country.
3. The present day condition and for it a reason.
4. A possible remedy.
5. An appeal to open mindedness and co-operation.

Let us look upon a lawyer. In the beginning of life we see him fumbling and raking amidst the rubbish of writs, indictments, pleas, ejectments, enfiled illatebration and one thousand other lignum vitae words which have neither harmony nor meaning. When he gets into business, he often foments more quarrels than he composes, and enriches himself at the expense of impoverishing others more honest and deserving than himself. Besides, the noise and fume of Courts and the labour of inquiring into and pleading dry and difficult cases have very few charms in my eyes. The study of law is indeed an avenue to the more important offices of the State and the happiness of the human society is an object worth the pursuit of any man. But the acquisitions of these important offices depends upon many circumstances of birth and of fortune, not to mention capacity, which I have not, and I can have no hopes of being useful that way.

Excerpt from a letter of John Adams
written to William Cushing in 1756,
from "A History of the American Bar"
by Charles Warren.

To My Critics.

Dear People,

Crime is rampant, economic need lies on every hand, everywhere peoples are hysterical, war and rumors of war lie about us, the youth of our own country finds little ahead, and we wonder if American civilization is decadent, and if we, too, are passing the way of Greece and Rome. It is not a pleasant picture that the years have drawn for us and whether we face a brighter tomorrow our finest thinkers can hardly determine.

The temper and philosophy of the American people have helped to keep us steady, but I wonder if the same temper and philosophy are not preventing us from working shoulder to shoulder for a better day? We are not reformers, in fact we are not keen about reformers, and they who would prate about the Decline of the West are in our estimation not to be taken too seriously.

The man and woman of intelligence honestly believes, as does the man of less education that our institutions--political, legal, social--are rotten, but the same individual rarely sees that he himself has any responsibility.

Economists have argued learnedly as to the causes which have brought the present conditions, but most of them have forgotten the basic cause--lack of character--and an appreciation of values. Selfishness and greed and ignorance

have laid us low, and only sane knowledge, homely honesty, and a recognition of spiritual values can restore us.

There is no justice you say! Law helps the rich, and crushes the poor, law is but a tool of the crooked. You would do away with the law, you would scrap the Constitution, you would eliminate lawyers and judges.

There is no good thing which in the hands of the unscrupulous cannot be made a tool of darkness. If law is the tool of the crooked might it not be because of an ignorant laity? An ignorant community is a fat pasture for the cleverly trained, unscrupulous lawyer. We, the victims, are at fault; our educational training leaves much to be desired. We instruct children in every subject except those which would best fit them to live and to serve. We allow impressionable youth in our secondary schools and colleges to come under the leadership and training of men and women whose one ideal in life is to get by, whose idea of success is "to be smart" in the accepted sense.

I know I am old fashioned, out of date, hopelessly idealistic, but I still believe there is a way back. Character would be the foundation stone in my educational system. Something more would I demand of teachers than degrees. I go from place to place lecturing in my subject and I am appalled at the ignorance which prevails in the realm of law. Men and women know not the simplest things, things which would be protection to them. So many times students come

from law courses far worse off than when they entered. They have been poisoned by those who would tell them how to accomplish murder and the finest gift of the ages has been dragged through the mud and mire of some evil, clever mind and then presented to the youth of our land.

In the pages which follow I have tried to present simple truths in simple language, truths which will perhaps surprise you and protect you, truths which could be given even in the grades, and I have not scratched the surface of the possibilities of letters of this kind. May they make you realize that if there is "no justice" it is because, we, the people, would have it so.

Yours very truly,

Excerpt from a letter of Benjamin Austin, "an able pamphleteer and Anti-Federalist politician of Boston," who wrote, in 1788, under the name of "Hesperus," and whose letters had a widespread influence, from "A History of the American Bar," by Charles Warren.

II A Letter to Lawyers, but not of my writing.

1. Your opportunities.
2. The need of a good conscience.
3. Rules of conduct.
4. The challenge.

The distresses of the people are now great, but if we examine particularly we shall find them owing in a great measure to the conduct of some practitioners of law. . . . Why this intervening order? The law and evidence are all the essentials required, and are not the judges with the jury competent for these purposes? . . .

The question is whether we will have this order so far established in this Commonwealth as to rule over us. . . . The order is becoming continually more and more powerful. . . . There is a danger of lawyers becoming formidable as a combined body. The people should be guarded against it as it might subvert every principle of law and establish a perfect aristocracy. . . . This order of men should be annihilated. . . . No lawyers should be admitted to speak in court, and the order be abolished as not only a useless but a dangerous body to the public.

Excerpt from a letter of Benjamin Austin, "an able pamphleteer and Anti-Federalist politician of Boston," who wrote, in 1786, under the name of "Honestus," and whose letters had a widespread influence, from "A History of the American Bar," by Charles Warren.

Words of Cotton Mather in 1710.

Gentlemen;

Your Opportunities to do Good are such, and so Liberal and Gentlemanly is your Education. . . .that Proposals of what you may do cannot but promise themselves an Obliging Reception with you. 'Tis not come to so sad a pass that an Honest Lawyer may, as of old the Honest Publican, require a Statute merely on the Score of Rarity.

A Lawyer should be a Scholar, but, Sirs, when you are called upon to be wise, the main Intention is that you may be wise to do Good. . . . A Lawyer that is a Knave deserves Death, more than a Band of Robbers; for he profanes the Sanctuary of the Distressed and Betrayes the Liberties of the People. To ward off such a Censure, a Lawyer must shun all those Indirect Ways of making Haste to be Rich, in which a man cannot be Innocent; such ways as provoked the Father of Sir Mathew Hale to give over the Practice of the Law because of the Extreme Difficulty to preserve a Good Conscience in it.

Sirs, be prevailed withal to keep constantly a Court of Chancery in your own Breast. . . . This piety must Operate very particularly in the Pleading of Causes. You will abhor, Sir, to appear in a Dirty Cause. If you discern that your Client has an Unjust Cause, you will faithfully advise him of it. You will be Sincerely desirous that Truth and Justice may take place. You will

speak nothing which shall be to the Prejudice of Either. You will abominate the use of all unfair Arts to Confound Evidence, to Browbeat Testimonies, to Suppress what may give Light in the Case. . . . There has been an old Complaint, That a Good Lawyer seldom is a Good Neighbor. You know how to Confute it, Gentlemen, by making your Skill in the Law, a Blessing to your Neighborhood. You may, Gentlemen, if you please, be a vast Assession to the Felicity of your Countreys. . . . Perhaps you may discover many things yet wanting in the Law; Mischiefs in the Execution and Application of the Laws, which ought to be better provided against; Mischiefs annoying of Mankind, against which no Laws are yet provided. The Reformation of the Law, and more Law for the Reformation of the World is what is mightily called for.

From an address by Cotton Mather.
"History of the American Bar" by
Charles Warren. The Law: Business
or Profession? Julius H. Cohen Pg. 112.

B The Historical Background--because of its very antiquity law deserves our respect and devotion.

I Letters to my southern friend of the inquiring mind.

1. July 4th and the birth of a nation.
2. The common law of which we talk.
3. The Keeper of the King's Conscience and the part he played.
4. The last word, the "Amen," as it were, of the law.

II A Letter to my friend's son now in Dartmouth.

1. To one who would study law.

The Law: it has honored us; may we honor it.

Daniel Webster.

July 4th and The Birth of a Nation.

Dear Laura,

Last night I went to sleep amid the beauty of Sky Rockets, Roman Candles, Red Fire and Wonder Wheels down on the beach and was awakened this morning to hear the occasional cracker that doubtless warmed the heart of some small boy in this community. It was a well ordered July 4th celebration,- fathers and small sons and daughters playing together, but tonight I am back in the crowded section of the Hill where many months of my life are spent, where pennies handed out by devoted fathers are few, where youngsters rejoice in noise untold,- and where small fire crackers would seem beneath the dignity of so many of the urchins. Nothing less than giant crackers would satisfy their craving for excitement. Poor youngsters, what a starved existence is theirs in many cases. Yet, though they know it not, narrow, congested streets, hot brick sidewalks have so long been their heritage that away from them all they would be ill at ease and unhappy. With all of our boasted laws about children and child labor we still have much to do in our Commonwealth, and I am rabid enough to believe that until we legislate on marriage along lines now abhorrent to some we cannot reach a solution. Unfortunately, too many of our people have no upward look, no desire to give their children "a better bringing up than his had been or hers", no desire for better things except in a limited material way. Yet I do contact some

marvellous young people, beautiful in body and spirit, who have come out of unsavory places. They have been chiefly of foreign birth whose parents have kept the gleam, and remembered the ideals of olden and finer civilizations than ours. But, Laura, I don't intend to go off on this tangent. Sleep is just impossible and my mind is working along the line of the morrow's news. Already I can see the items,- this child burned, another killed, another blinded,- the outcome of a mistaken patriotism. July 4, 1776 seems a long way into the shadowing past, yet that date separated our legal as well as our political institutions and is the cleavage date for our common law.

Do you know what I mean by our common law?

Continued on the morrow,

The Common Law of Which We Talk.

Dear Laura,

Massachusetts is a common law state. I say it with pride for the great mass of common law, dating from antiquity and used by the English people through the centuries, became a part of our inheritance when we severed connections with the mother country.

I like to think of common law as crystallized public opinion, growing out of customs and the human tendency to react to a given situation as predecessors reacted. Do you see what I mean when I say that common law has rigidity because of the force of precedent? We who like to think in legal phraseology often speak of the doctrine of "stare decisis". That means the same thing. Dig up your rusty Latin and what have you but the admonition, "Let the judgment stand". I like to think of the old common law judges handing down decisions in harmony with the earlier holdings. But you say that means no progress. No, but because it through the years was largely unwritten it was ever adaptable and a judge of the modern spirits could interpret the common law in the light of growing needs.

Common law seems much more democratic, much more sturdy and fine than the civil law of the continents, the codes of the Emperors, all of which trace their beginning to the Justinian Code of Roman days. I'm glad I don't practice or teach in a code state. By the way, New York is a code

state for she has attempted to codify all of her common law. I'm thinking that she will still be busy at it when Gabriel sounds the final call.

Again I must leave this until the morrow.

Devotedly yours,

The Keeper of the King's Conscience and the Part He Played.

Dear Laura,

When we say that we took over the common law of England July 4, 1776 we also include the system of Equity which had become gradually fastened upon England from the days of Edward III. You see people in those days were like litigants today; there was always some one dissatisfied with the decision of the court of common pleas, and redress was sought from the King. He, of course, could do no wrong and his disposition of the case would be final.

He sought to do equity until the time came when litigants were so many that he turned the work over to the Chancellor of the Exchequer, who became the keeper of the king's conscience; he, too, could do no wrong. Chancery courts, or equity courts as we call them sprang into existence. Both of those terms I know you have heard.

The Chancellors were men educated on the continent and therefore learned in Roman law. So the system which was then engrafted on to the common law of England was quite distinct and apart. Gradually in England the equity courts took over cases involving equitable parties, husband and wife, partners, trustees and cestuis; equitable subject matter, assignments, trusts, mortgages; equitable remedies, injunctions, decrees for specific performance, reformation or cancellation of instruments, rights of contribution, exoneration, subrogation. Some day I'll tell you more of their meaning, but

note they are all Latin words in origin. We follow England's plan, still using however in our state the two forms of pleading, common law and the equitable pleading, England no longer does.

The equity pleading is interesting,- the petition ends in prayer, a prayer for specific and general relief. If you will permit your imagination to run riot you will understand that no one would approach his sovereign except in the role of a humble petitioner praying for such relief as the sovereign in mercy and justice might grant. I am still glad the prayer remains with us in law! No branch of the law today is so filled with the spirit of progress and modern interpretation as is the field of equity.

Good night, friend mine,

The Last Word, the "Amen", as it were, of the Law.

Dear Laura,

You asked me in your note if all our law came from the common and equity law of England. I would remind you of that noisy body on Beacon Hill,- the so-called Great and General Court engaged in the business of making laws. Much do they add to our trouble as well as to our progress for they are responsible for statute law, the law which is the last word, the "Amen", as it were.

Statutory law either over-turns, reaffirms or meets new situations. To illustrate briefly, every aeroplane is actually a trespasser. Did you ever think of that? It is a trespasser because it penetrates your close, that invisible wall which surrounds your land from the center of the earth to the zenith of the skies above. Think of the law suits which could be started daily had not the legislature seen fit to pass a law establishing the non liability of aeroplanes, except in case of low flight or special injury inflicted. There the statute has met a new situation.

Charles Clark, our minister's son, was hauled into court last week for driving on the left hand side of the road. All the family are predicting my Waterloo for the same offense. Personally, I am cherishing a secret belief that Charles is not telling all he knows. However, perhaps I shall change my mind some day. The "Gertie Glooms" say I will, for I do love the center of the road when all ahead is clear, the

view is so much better! It has always been a part of our common law that vehicles should drive to the right, but in order to be doubly sure a statute presents the same ruling. Here the statute merely reaffirms the common law.

Now for an example where the statute has overturned the common law! Years ago, to be exact, before 1842 in our state, a woman married the man of her choice and brought to his home as her choicest possession a fine old mahogany bureau. Next time you are at the Beacon Hill house look at it in the room which I love so well on the second floor and where I spend so many happy hours in study. I like to think that this ancient ancestor of mine rubbed and polished its wood to the soft satin glow of today and that many a time and oft she admired its lovely grain and packed her treasures in its spacious drawers.

Well, the man died, and to her horror she learned that beloved bureau was a part of his estate and must be sold. Money she had, and she bought back her bureau, feeling that she had come near losing a very precious thing. However, in time she married again and the experience of the past was forgotten. This time financial reverses came and when he died she awoke to a realization that the bureau again was in danger of passing into stranger's hands. However, through labor and effort she earned its price and redeemed it again.

It was not many years before another suitor sought her hand, but she drew away coldly and said, "Young man, I prefer to keep my bureau". And I'm selfishly glad she did,

because, if she had married, it probably would never have found its way to me and without it the room would be quite incomplete. As I sit and watch the fire light reveal its beauty I know that I feel anew the emotions which must have stirred the heart of Elizabeth Malcom Cook, my great, great grandmother.

Such a thing could not happen today for the Married Woman's Statute was passed in 1842. We may marry today and our earthly possessions will remain our own property; likewise our debts and obligations will not pass to the shoulders of our husbands. You see after all there was some justice. In those days he took the bitter with the sweet. We are told that in the days of Queen Elizabeth, when the women gambled more than they do today, and it is bad enough now, it was customary for women of the nobility to marry on the eve of execution, condemned criminals. A nice arrangement, for don't you see that when he went to the gallows on the morrow all her debts went with him? If he chanced to be pardoned it probably wasn't so good, because although she had no debts perchance she had something more troublesome, a husband!

Laura, I have rambled in these letters further than I intended but when one gets to writing about the Beginnings of Things there is much to be said. I haven't told you anything about the lesser sources of law and I'd like to tell you more if I may some day. I recall how much we enjoyed Kiplings "Puck of Pooks Hill" that summer we read it together,

and so for that reason I feel sure that were I able to tell it attractively you would enjoy with me the hidden forces which have emerged in our legal institution, faulty as they are.

And all these, because of the Fourth!

Devotedly yours,

To One Who Would Study Law.

Dear Elmer,

Shall you, or shall you not study law? I hardly know how to advise. As I have watched you grow up, seen your interests, capabilities, and studious tendencies, I have often thought that you had much to bring to the law! You have a mind which is keen, analytical, logical. You also have loved to argue and to delve deeply into the reasons of things. I believe that you would enjoy the study of law, and I think you would be keen about its practice; I'm not.

In many fields have I delved, but never have I found a subject so fascinating as this one, a subject which so absorbed every fibre of my being and which demanded such complete devotion. Frankly, if you go into the law, you will marry it; it will occupy no secondary place in your thoughts or in your reading. Upon your decision rests your future.

I shall never forget the day I finally decided to give it of my best. I had taken some courses in law without any thought of making it my life work, had become intensely interested, had prepared some lectures for a correspondence school and finally had been advised by a lawyer to go into the field. My one desire was to get far away from people, from things, to think the problem through. I took the car and drove to Scituate. There out on the rocks with the vast expanse of ocean ahead and human beings far away, I fought my way to a decision. I had a good teaching position, was

on tenure, my future was fairly well assured; I liked my work and was happy. I had studied long years, nights as well as days. Should I give it all up and start anew? I wasn't afraid of that, but I was afraid that my mind would meet a blank wall, that I would get beyond my ability, and that I would fail. Somehow I came to appreciate that one never did reach the limit of his ability and, like the house with the golden windows, the ability line ever moved forward. I recalled the old Biblical quotation, "Behold I have set before thee an open door."

It has been a long road, but a glorious adventure and I am glad I left the well-trodden pathway. I shall never be a great trial lawyer, but I believe that I am proving my worth as a law teacher. I used to think I must do more and more trial work and that I was cowardly if I disliked it. Now I know how foolish was that attitude. Today my desire is to build up an organization which will be a complete unit, and, Elmer, I have one of which I am most proud. Some day I will tell you more of it.

If you decide to study law, you will study not less than twenty-eight subjects and their scope is sufficiently broad to meet every demand of your intelligence. There are the exact mathematical subjects where two and two make four, Bills and Notes, Partnership, Bankruptcy, Corporation Law, Massachusetts Practice. There are the subjects which mirror the progress of thought in Jurisdiction, Equity, Trusts. There are the subjects rich in the heritage of the past,

Future Estates; story-book subjects, Common Carriers and Bailments; subjects rich in history, Constitutional Law; subjects which are full of pathos and tragedy, Criminal Law, and to some extent, Domestic Relations; subjects closely allied to daily living, Torts and Contracts; subjects which remind us that though dead, we live on, Wills, Probate.

Elmer, I have only suggested the wealth of the field and because there are many subjects, there are many opportunities for service. Probably the trial lawyer is in the minority but I imagine that that is the field which appeals to you, and because you have character, note I put character first, ability, willingness to sacrifice, I believe that you may go far in this profession if you decide to make it yours.

I shall look forward to hearing from you.

With greatest interest,

C Letters to Business Men and Women and we are all included.

I The subject of Contracts--what we should know and we should know much for life is made up of contractual relations.

1. The subject outlined for the benefit of those who would gain further knowledge.

"Bel-ah-iddina and Belshunu, sons of Bel -- and Hatin, son of Bazuau, spoke unto Bel-nadin-shumu, son of Murashu, thus: As concerns the gold ring set with an emerald, we guarantee that for twenty years the emerald will not fall out of the gold ring. If the emerald should fall out of the gold ring before the end of twenty years, Bel-ah-iddina, Belshunu, and Hatin shall pay unto Bel-nadin-shumu an indemnity of ten mana of silver. Thumb-nail mark of Bel-ah-iddina, Belshumu and Hatin instead of their seal."

A contract made in reign of King Artaxertes (464-424 B.C.), more than 2,300 years ago. It was inscribed on a baked brick dug up in the ruins of the ancient City of Nippur, Babylon.

Contracts, -Express and Implied.

Dear Mr. Carr:

I understand very thoroughly how you feel and how hard it is not to be bitter in the situation in which you find yourself. All these years you have remained at home and have worked upon the farm and helped to make the place what it is today, while your brothers and sisters have gone out into the world and have found apparently, opportunities more agreeable to them. Now with the passing of your father their unwillingness to allow you anything for the years of work which you have put upon the property does seem tremendously unfair.

Unfortunately, in our State, when one works for the family, unless there is an express agreement to the contrary, he is not entitled to any specific compensation and for that reason were you to bring suit against the Estate to recover at the rate of \$20 a week over the past twenty years, I feel that you would lose out. We often say that even when there is no express contract there can be recovery upon an implied one if the individual can answer "yes" to at least four questions.

First, has he rendered a benefit?

Second, has he rendered it in expectation of pay?

Third, was the other person aware of the expectation?

Fourth, was the other party silent in face of facts which called upon him to speak?

If you will meet these questions fairly you will answer the first, yes, for you have rendered benefit upon benefit. On

the second question I am not so sure, perhaps you will say that you have rendered services in expectation of pay some time, but I doubt if you have looked upon it as yielding you a definite weekly income. Your father, fine man that he was, was a man of the old school who really would have felt that it was the duty of his child or children to remain at home as long as he needed them and that in providing you in these years with the necessities of life, the home roof, abundance of food and companionship, that he was doing all that you could possibly expect. If the answer is "no", to the third question, it follows that the answer to the last question is also, "no".

Legally, I do not believe you have an opportunity to recover; morally, you should. It appeals to me that any lawyer who takes your case should take it with one idea in mind,- that of attempting to make your brothers and sisters, who now today have more of this world's goods because of their opportunity to get out, to desire not only justice but generosity.

Try not to be too bitter over the situation and to believe that after all there are eternal values that are of greater importance than dollars and cents. I know of nothing in the world that so thoroughly reveals human nature as the acid test of fifteen cents.

Cordially yours,

Cooper v. Cooper, 147 Mass. 370;
Graham v. Stanton, 177 Mass. 321;
Butler v. Butler, 225 Mass. 22.

Was the Offer Accepted?

Dear Mr. Riley:

Thank you for sending me a copy of your letter to Mr. Norris. It tells me exactly what I expected it would. You wrote him that you would like to sell him your tractor for \$75. His letter accepting your offer was missent to Plymouth through no fault of his and therefore delayed in delivery to you. In the meantime you sold the tractor to some one else and Mr. Norris thinks that you are liable to him for breach of contract. You surely are, and you may be glad that this is but a friendly test case.

You see when he mailed his acceptance that moment the contract was complete. Your offer was by letter - you expected him to reply by letter - and when the letter was properly stamped, directed and mailed within a reasonable time a contract at once came into being and even though you had never received the letter if he could prove his statements, you would still be liable.

Next time say, "If I hear from you by Thursday I will sell, etc." or say, "Upon receipt of your reply I'll consider the deal closed." He who makes an offer can always protect himself by the proper wording of his offer, but if he doesn't Massachusetts finds a contract with the mailing of the acceptance rather than upon its receipt as long as it is a proper acceptance, i.e. properly stamped and mailed, made according to the terms of the offer,

unconditional, absolute, within the time specified, or if none is specified, within a reasonable time, to the place specified and in the manner specified.

Treat Mr. Norris to the dinner he demands and consider yourself lucky that he is your friend and not your enemy.

Hastily,

Tobin v. Taintor, 229 Mass. 174;
Taylor v. The Merchants' Fire Ins. Co.,
9 How. (U.S.) 390.

An Offer or an Invitation To Deal

Dear Frances,

This morning I walked down Tremont Street and enjoyed as I ever do the store windows. In Leonard's windows they had some very attractive and inexpensive dresses and I went in to see if I could get something for you to give Louise. While I was there a young woman asked to see a certain dress in the window, and the girl showed her one priced \$9.75. The woman immediately called attention to the fact that the tag in the window said \$5.75, and it did.

The buyer was called and she was much disturbed over the error. The woman was most disagreeable. She would have the dress at \$5.75, or she would expose their crooked methods, etc., etc. Finally, the buyer told her wearily that she could have the dress in the window for \$5.75 and the woman bore a triumphant air. However, the dress in the window was size 36 and the woman needed a 42. Again the battle raged. I was afraid the buyer was going to give in and stand the loss from her slender earnings as I knew she would have to do. I dropped my handkerchief at a convenient spot, and managed to say to her, "Don't give in." She squared her shoulders and vanquished the enemy who departed with threats involving reports to the Better Business Bureau.

Then I had a chance to tell the girl that window

displays are, after all, but invitations to deal, that the offer comes from the customer and that no contract liability arises until the store accepts the offer.

So many times seeming offers are not offers after all, and people insist on rights they do not possess. We have discussed this point so often that I knew you would be interested in its practical application.

Hastily,

Smith v. Gowdy, 8 Allen 566;
 Montgomery v. Johnson, 209 Mass. 89;
 Moulton v. Kershaw, 59 Wis. 316;
 Ashcroft v. Butterworth, 136 Mass. 511.

The Price We Pay When We Fail to Read the Fine Print

Dear Evan,

How many times I think of the one-pipe furnace you and Ada bought the first year of your marriage and of the stunt we put over on the concern when we had it dumped on their door step in the early hours of the morning. Evan, you were fortunate. When I think of that iron-clad contract you so blithely signed without reading, and the things they could have done to you, I feel that the fifteen dollars you lost was but a mere bagatelle.

Recently I heard of a case which will interest you. A man bought a truck for \$1600 on a conditional sales agreement, \$100 down and the same amount to be paid each month. The contract provided that in case of default of any payment that the company could repossess itself of the car, and that all payments made would be forfeited. In addition to these provisions which are to be found in all conditional sales agreements was another, namely that any unpaid balance should be considered as liquidated damages and be due and owing the company.

The man paid \$1200, met with business reverses, had to give up the truck which the company sold for \$800. Then the man had money left him and the company sued him for \$400 and recently got a judgment for that amount, so out of the one truck they took in \$2400.

Dreadful? Yes. Who was to blame? No one except

the man who signed the contract without reading it and understanding its meaning. The courts are not here to make the contracts; their business is to enforce the contracts as made.

Concerns know that people do not read the printed material and they deliberately discourage any one who would, by putting in print so fine that a magnifying glass is needed.

Preach the gospel of never signing on the dotted line until one knows fully what he has done!

Am I unkind to remind you of other days?

Forgive me,

O'Reilly's Case, 258 Mass. 205;

McKenney v. B. & M., 274 Mass. 217;

Fornseca v. Cunard Steamship Co., 153 Mass. 533.

Offer, Acceptance, Revocation.

Dear Lawrence:

So after all you didn't purchase Mr. Green's Essex, which he has so tenderly taken care of this past year! There is no question but it was an excellent buy. I am sorry that you didn't get it but you really have no come back against Green even though you say you are peeved and are seeking revenge.

It is true he did make you an offer,- the car for \$350 and a week in which to think the proposition over,- but Lawrence, you never accepted that offer,- although you tried hard enough to do so,- before it had been revoked by the sale of the car to another. Without an acceptance there can be no contract, and without a contract, no rights can arise.

You are infuriated because he had given you a week in which to make up your mind, and because you didn't want him to think you too anxious you decided to keep him guessing throughout the week. Little did you realize that he was under no obligation to keep that offer open a week unless there had been a seal upon the writing or you had paid him something to keep it open,- we call it an option.

The law says that an offer can be accepted until it has been revoked and had you succeeded in getting him on the telephone Wednesday afternoon of the seventh day and told him that you were ready to take the car, before he had told you of its prior sale, a contract would have resulted.

If these had been the facts you would have been able to sue him for breach of a contract had you so desired and you would have been entitled to money damages.

Even when not able to get him on the telephone if you had gone directly to the house and not stopped enroute at the Post Office and there seen the car in question in the possession of Rollins who told you of his recent acquisition you still might be able to get damages for breach of contract. As it is I fear you are wholly out of luck, for you can neither get the car or damages.

The offer which Green made to you he revoked when he sold the car to Rollins. He surely took a chance when he didn't notify you personally for knowledge that an offer has been revoked has to be brought home to the offeree prior to his attempted acceptance to prevent a contract arising. However, you did learn of the sale, even though indirectly and that was enough to prevent you from accepting, for no longer was there an offer to accept.

Better luck next time.

Sincerely,

Sears v. Eastern R.R., 14 Allen 433;
 Spencer v. Merrimac, 242 Mass. 170;
 Benton v. Springfield Y.M.C.A., 170 Mass. 534.

All About Seals and the Significance of the Attached Wafer

Dear Junior,

The little red wafer with the letters "L.S." that you picked up in the office the other day is what we call a seal. There was a time when boys didn't learn to read and write unless they were intended for the church. If theirs was to be a life of fighting, the ability to write would be of little value and that accomplishment was left to the clergy. In fact there was a time when a man accused of a crime would plead "the benefit of the clergy" if he could read and write to escape punishment, and he would escape, too. The chief punishment was death and men who could read and write were so few that the government felt their lives should not be taken.

But to go back, because there were times when even a fighter needed to express his binding assent, the custom grew up of impressing the signet ring into the soft sealing wax affixed to the paper and the seal had come into existence. That old custom to some extent is still with us. You have seen mother seal her letters, haven't you, and Hope has the signet ring that was mine years ago.

The sealing wax crumbles so badly that after a time legal documents were sealed with wafers similar to the one you took from the office last week. The letters "L.S." stand for "locus sigilli," the place of the seal. There are some papers which according to the law must be sealed; for

example, all deeds conveying lands, mortgages, bonds, releases. But even though the instrument does not require a seal if one is placed upon it, it changes the force of the instrument.

People are not obliged to use the little red seal or the sealing wax. They can use any attached wafer or today, in Massachusetts, they are permitted to simply write that the instrument is a sealed instrument and that is sufficient.

I think I shall have to begin to teach you law.

Devotedly yours,

G. L. Ch. 4, s. 7, cl. 29;
 stricken out by Act of 1929, Ch. 377.
 (Today one may recite that the instrument
 is sealed and omit the attached wafer.)

Did You Promise to Pay the Debt of Another?

Dear Mr. Lewis,

We all appreciate how generous you have been and how many poor families you have helped through these days of cold and hunger and suffering. At the same time, I don't think you should be imposed upon, and personally I feel that Hawkins intends to do just that.

When I was in the store this afternoon, I couldn't help but overhear your conversation. I know that you felt he was acting in good faith and that he really meant it when he said he would pay for the groceries furnished the destitute family down the street. Perhaps he did mean it but I have had some dealings with him that make me suspicious.

Let me ask you some questions. You never expect to look to the Maguire family for a single penny, do you? You are looking solely to Hawkins on that bill, aren't you? If you will keep these two points in mind, you are safe, but if the need ever arose and you testified that you had hoped the Maguires would pay, but if they couldn't, you had expected Hawkins to make good, you would lose out. Why? Because the promise to pay the debt of another since 1676, because of the Statute of Frauds, passed in the reign of Charles II to prevent fraud and perjury, has to be in writing. As long as you deal only with Hawkins, it makes no difference whether the promise is oral or written, but if you are looking to both, then to hold Hawkins, his promise

must be in writing.

I just wanted to say this to you, that you might understand your position.

Truly yours,

Swift v. Pierce, 13 Allen 136;
Hammond Coal Co. v. Lewis, 248 Mass. 499;
Hill v. Raymond, 3 Allen 540.

Mysterious Facts about Checks you Receive

Dear Doctor Freetag,

I do sympathize with you because you are my friend, and I'd like to tell you to go out and make that patient of yours pay the rest of that bill, but man, I can't. Even if your charge was reasonable for an appendicitis operation--and I'll take your word for that--why didn't you get in touch with me before you ever cashed that check marked "in full of account"? I'm sorry, but in my estimation you are plain "stuck" and you better charge the matter up to profit and loss--chiefly loss--and forget it.

You tell me that when Jones came to you he really was in dire need and that no charge was discussed, but that you got him speedily to the hospital and on the operating table and that he owes his life to your prompt measures. That all sounds well, Mr. Surgeon, but probably after he got your bill for \$1000, he didn't thank you for saving his life. I doubt if he would value it so high.

Forgive me, I am sorry, but don't you see that bill was what we would term as unliquidated? There is, you'll confess, no set price for operations. I suppose doctors, like lawyers, charge whatever the traffic will bear, and unless there is an agreement, an understanding beforehand, as to the amount of the bill, it cannot be said to be liquidated. On the other hand, if you went into a garage

and bought U. S. tires, there would be a liquidated bill, for whether you asked the price or not, you would understand that you would be charged the going price. Do you see the difference?

I know that you rely particularly on the letter that you got from Jones in which he says that your charge is outrageous, but ends up by promising to pay. Again, I'm sorry, but that promise is no good. He gained nothing as a result of his promise, the operation was all over, and successful, and he was still a going concern. If he had made the promise while the fateful knife was poised in midair, the result would be wholly different. Then you could say that you operated on him because of his promise, and as a result of his promise he gained freedom from pain, health and a renewed interest in life. But all these things he had when he reluctantly promised to pay, and his promise is worthless as far as you are concerned. Evidently, he changed his "yes" to "no." The check for \$400 marked in full of account proves that women are not the only ones who change their minds. Here is where you made your mistake. Because the amount was unliquidated you could cash that check only by accepting its terms. If you were not willing to take \$400, instead of \$1000, you should have returned the check. Note if the amount had been liquidated, as in case of a bill for tires, you could have cashed the check safely and then proceeded to collect the balance. I am sorry to disappoint you legally, but if Mr. Jones will not

add to the installment, don't carry the case to court if my statement of the facts is correct. Just don't walk into that trap again. It is a trap that many do fall into.

One of the lawyers in the next office did the very same thing a month ago. He had sent a bill of \$150 to a client and had received a red-hot letter and check for \$75 which was plainly marked "In full payment." He, too, got hot and went out and cashed the check immediately, then came back to the office and indulged in a charming fit of temper, and told everybody what he was going to do. I didn't say a word. Poor man, he had had enough for one day, but the case of Attorney vs. White will not clutter up the Superior Court docket for many a day. He'll come to after he looks up some law on the subject.

Sincerely yours,

Conant v. Evans, 202 Mass. 34;
Whittaker Chain Tread Co. v. Standard Auto
Supply Co., 216 Mass. 204.

If an Additional Sum Was Promised, What Then?

Dear Addie,

Don't get excited. I don't know why men sometimes feel that a woman is lacking in ordinary business sense.

The carpenter told you that he would build the sun porch for \$175 according to the specifications and now he has demanded an extra \$50 and in order to get the work done you have told him you would pay it when you could. And you are sick!

Addie, he can't collect one penny from you over the \$175 if you do not choose to give it. He has already agreed to do that work for one price, and under the circumstances your promise to pay the additional sum is without consideration. Take my word for it that you will not be bound.

This particular carpenter has a reputation for this particular kind of a stunt but for once we are not going to let him get away with it.

Cheer up.

Devotedly, your lawyer,

Parrot v. Mexican Central Railway, 207 Mass. 184;
Torrey v. Adams, 254 Mass. 22;
Feinberg v. Adelman, 260 Mass. 143.

Contracts of an Infant

Dear Evelyn,

For a few moments this morning I was really afraid that you might have gotten yourself into an unfortunate predicament by trying to be kind to those ne'er-do-wells, the Grosses, but when you told me that you were but eighteen my fears vanished, and I really meant what I said when I told you you could safely forget the entire matter and dismiss it from your mind. It was worth years of hard work to see your expression change from one of complete unhappiness to one of hope, but I am afraid that as the day has progressed you have doubted me at times, so I am going to put down in black and white the legal principles upon which you may safely rely--principles which, by the way, could easily be presented in every high school throughout our land to the youth of America and prevent just such suffering as you have been undergoing for the last six months.

I can understand, Evelyn, why you could not talk with your grandparents. They are of the old, old school, intolerant of the mistakes of youth, but surely there was some one who could have prevented these weeks of fear. How many pounds have you lost, and all because you feared that any moment the radio was turned on you would hear your name announced as one who didn't pay her bills, as one who owed \$23.75 for a set of dishes, probably by this time used as weapons of warfare in the Gross household. A firm who

indulges in that kind of threat deserves to be reported to some Better Business Bureau, if such a thing exists in the locality.

In Massachusetts no boy or girl becomes of age until the day before his twenty-first birthday. Many people think that girls become of legal age at eighteen, but that is only for one purpose. A girl after eighteen may marry without her parents' consent, but her contracts entered into at that time are no more binding than before. When I say binding, I simply mean that she cannot be made liable for them, unless they involve necessities, until she reaches her twenty-first birthday, and then only if she ratifies them--that is, acknowledges her willingness to stand by them or in some way benefits under them. To illustrate, if she bought a car and after she reached twenty-one she either promised to pay for it or without any promise continued to drive the car, she would become liable for the price.

Dishes for the Gross family by no stretch of imagination could be considered a necessary for you. Some day, if you are interested, I'll tell you more about necessities, but I haven't time today. Mrs. Gross did a despicable thing when she came into the post office and asked you to sign that paper. Why did you believe her when she told you that you were but witnessing her signature? Did you ever know any member of that family to tell the truth? What you were actually signing, Evelyn, was a promise to pay for the dishes which she was ordering if she did not. Of course the print

was fine and hard to read, but regardless of that fact, Evelyn, never sign anything you have not read. I can almost say, "Don't sign it after you have read it," for frequently the language is so technical that the average person is not greatly enlightened after he has waded through it. I criticize very severely any firm that has to put its contract in print so fine as to discourage people from reading it or who feel called on to use language so technical that a Philadelphia lawyer is needed to interpret it. I know at once that their products will not stand the test. However, as long as we are ignorant we are excellent fodder for their gristmill.

I am sorry that you have suffered in silence all this time. I wish I could have found you sooner and detected, as I did today, that there was something quite wrong with the world, but I do not think you will hear from them again. I have sent a letter pointing out bits of law which they thoroughly know, but which they do not think you know, telling them your age, asserting your intention under the circumstances of avoiding any liability. Technically we speak of it as disaffirming the contract, but in plain English it means telling the concern that you know you are not liable under the law, that you don't intend to be liable and shall never pay a penny. You may receive one more letter as a final gasp of a dying concern. If you do, let me have it and I'll decide whether it is worth another postage stamp.

Sincerely yours,

Tracy v. Brown, 265 Mass. 163.

The Infant and His Necessaries

Dear Evelyn,

Thanks for the note; I am only too glad to have been able to help. Inasmuch as almost a month has passed, I doubt if you ever hear from the firm again and that chapter is probably closed.

You say you are curious to know what "necessaries" are. Well, they are the things we really have to have to continue to live--food, clothing, shelter, and for their fair value even the infant may be held personally liable if the store keeper sold them to him really expecting him to pay and there was no one else who was ready and willing to purchase the article for the minor. The term is more or less elastic, because what would be a necessary for one would not have to be a necessary for another--one's station in life determines to a certain extent. There is an old English case where a diamond ring was considered a necessary for an Oxford student whose father was a member of Parliament, but last week I talked with a jeweller in Middleboro and he was disgusted enough because he had sold an engagement ring to a minor who, by the way, had lied about his age. The minor had given the ring to the girl, and she had disappeared and with her the ring! What could Mr. Hunt do? Nothing, as far as I can see. That diamond was not a necessary; the boy was a minor even though he was a member of the Ananias Club, and he could avoid his contract and evidently intended to do so.

If he had had the ring he could have been forced to return it for the law's protection of the minor does not permit him to both repudiate and keep the goods. That would go too far--farther than is necessary for his protection, but if he has not the ring he still can disaffirm, and he was doing it all right.

I always surprise people when I tell them that money is not a necessary. They immediately mentally commit me to Danvers, but truly it is not. Robinson Crusoe on his lonely island would have starved to death with all the gold of the world. If I am ever to recover money given to a minor, I must see that it is definitely expended for a necessary. I loaned a girl last winter money for her school tuition, but I confess I was careful to pay the tuition myself, rather than give the girl the money for it. That was foolish, because I know the particular girl will pay, but I suppose I was merely unconsciously following my legal training. Education may be a necessary, you see.

The reason why the law requires a minor to meet at least to a fair amount the bills for necessities, is a logical one. If he could not validly contract for these things it is conceivable that he might actually suffer for the needs of daily living, because no person might care to take a chance on his moral integrity where there was no legal responsibility.

Do you think the law is too kind to its youth? I don't think so, Evelyn. Take your case, for example, a real

injustice would have been worked out, Evelyn, if you had not been able to side step responsibility. On the other hand, there is no good thing which is not at times put to a bad use. The trouble is not with the law, but in the character of people. Many years ago I went to a certain near-by high school to teach and was surprised to learn that the law course had been dropped the year before. Finally the principal told me why. The instructor had been a "Smart Aleck" type of person who figured on "getting by" in life. Note that such people rarely "get far." He had taught his students some of the things I have told you, but he inspired them with the desire to "put over" things, and they bettered his teachings until the store keepers in the city rose up in arms. As a result, the law course was discontinued. I resent such teaching. Law is one of the finest subjects that any person can study; its principles work out substantial justice and equity when used by those possessing character and ethical standards, but in the hands of crooks, it becomes an undesirable weapon. Shall we criticize the law or the people who use it to obtain their selfish ends? Until people realize the need of both character and knowledge we are in a bad way.

Devotedly yours,

Moskow v. Marshall, 271 Mass. 302;
Pierce Co. v. Wallace, 251 Mass. 383;
Tupper v. Cadwell, 12 Metc. 559.

Married Women and Their Contracts

Dear Mrs. Durant,

The Workman's Compensation Act provides for compensation for employees under contracts of hire whose injuries arise out of and in the course of their employment. You ask me about your young friend who worked in her husband's shoe store for eighteen dollars a week and was injured by falling from the ladder while getting shoes.

I am sorry, but she cannot recover from the Insurance Company in which he insured his employees. To be an employee, a contract is necessary and in our state a wife cannot contract with her husband. Technically, therefore, she cannot be an employee and so is without redress.

Some states permit contracts between husbands and wives, but not ours.

She loans him money and he gives her a promissory note and it is no good.

They agree to live apart and she promises not to pledge his credit to an amount greater than \$35 a week. The promise is worthless.

Supposedly the man and wife are partners. He gives a firm note, and she has all the money, but she can't be sued on the note because a partnership is a contract and she cannot be a partner with her husband.

Today, with all people except her husband, she can contract freely but there was a time when a married woman

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Today, with all people except her husband, she can contract freely but there was a time when a married woman

could not contract at all except for her personal services and then he could collect her wages.

Your friend had better work for some one else beside her husband.

Sincerely yours,

Humphrey's Case, 227 Mass. 166;
 Lord v. Parker, 3 Allen 127;
 Barbour v. Sampson, 266 Mass. 160;
 Jordan Marsh v. Cohen, 242 Mass. 245.

That Sunday Contract

Dear John,

Yes, I can tell you the law, and I can also tell you another law known as a moral law.

I saw you two people engaged in earnest conversation after church Sunday and I also saw you go flying past the house in the blue roadster later in the day so I surmised that you people had been doing a little business on Sunday.

So he agreed to sell you the car for \$65 and told you that the tires and battery were new. He was good enough to give it to you then and there so you could take Myrtle to ride that afternoon and you agreed to pay him on Tuesday. Now you have discovered that the tires are poor and the battery of little worth, and you have been told that inasmuch as it was a Sunday contract that you don't have to pay for the car. What can I tell you?

Plenty, dear Sir! Your contract was made on Sunday, it is no good. If you wanted to sue him because the tires are poor and the battery punk, you couldn't. Nor can he sue you for the price for our courts are not here to aid wrongdoers. If he hadn't delivered the car to you until Monday, he could have sued you for the fair value, and made you liable on an implied contract for the fair value because he could have ignored everything done on Sunday. But when he was good enough to deliver the car to you on Sunday, he

lost all rights. He cannot sue you in either contract, or tort, or replevin.

How joyful do you feel? Don't take advantage of your position, John. If he lied about tires and battery have it out with him and then pay him a fair price for the roadster. Legally you are not bound, morally you are, and this is one of the things which must be left to that interior forum known as man's conscience.

I know you will do the square thing.

Depending on you,

Mann v. United Motor Co., 226 Mass. 495;

Ladd v. Rogers, 11 Allen 209;

Bradley v. Rea, 14 Allen 20.

Do You Bet? Take Heed

Dear Gertrude,

Recently the death of Mr. Fraser appeared in the paper. Do you recall the Fraser girls who were in our class in High School? Their father was a professional gambler and I have thought of them so often since I have been in the field of law.

There is a statute on our books which enables an individual who loses a bet to recover the amount from the winner in an action of contract anytime within three months. Should the loser fail to take advantage of the statute any other person could recover three times the amount in an action of tort after the expiration of the three months' period.

Comparatively few cases have arisen under the statute. I presume there is honor among gamblers and their families, but I have thought frequently of the girls since I have known of the law and wondered about their lives and home conditions. Will they grieve over his death or feel a sense of relief?

More anon,

General Laws (Ter. Ed.) Ch. 137, s. 1, 2;
 Cole v. Groves, 134 Mass. 471;
 Reed v. Stewart, 129 Mass. 407;
 Kemp v. Hammond Hotel, 226 Mass. 409.

With the Money Lenders.

Dear Miss Fiske:

I was exceedingly interested when you asked me to speak to the Boston Teachers, particularly along the line of "Money Borrowing". I judge that you, like myself and other professional people, have had the experience of receiving every so often a most attractive piece of mail, in fact one which would suggest even a wedding announcement before it is opened. However, a perusal of its contents always reveals grave solicitation on the part of some concern as to whether or not we will be able to finance our summer vacation or to purchase the particular luxury which we much desire, and the offer to put into our hands the wherewithal under conditions and rates so attractive as to be alluring to the individual who has little knowledge along this line, is frequently most misleading.

Many years ago when I came out of Normal School one of the students found a position in a nearby city, and we all rejoiced that so good an opening had apparently come to her for we knew that she had had many financial problems. It was not more than a year later that I learned that she had killed herself and I could not understand what had led her to that desperate step until I found that she had gotten into the clutches of money loaning sharks to the point that she was borrowing money to pay interest on interest due and the burden had just become too great.

People do not realize in Massachusetts that these money loaning companies who loan small sums can legally charge a rate that is equal to 36% a year. Their advertising material is couched in very attractive terms and the nominal 3% that they mention does not carry the thought to the average person that that means 3% a month, which sum multiplied by twelve means 36% a year.

If only teachers and other professional people who are the chief victims of these concerns could be made to understand that it would be far better to go without the desired luxury or to borrow from some desirable business friend, I think we could do much to lessen the present evil.

Thank you for the invitation to speak before the Boston Teachers. I shall be very glad to stress this point along with others that may be of value.

Cordially yours,

General Laws (Ter. Ed.) Ch. 140, s. 90, 96, 103.

Parties Who May Sue and be Sued

Dear Ada,

Whom do you suppose I recently met? Louise Hunt and her young son. He is a cunning little youngster but when she told me that his name was Benjamin, I must have looked surprised. She told me that an old friend of her husband, Benjamin Schweitzer by name, had promised to give the baby \$2000 for a college education if the child was named for him. Very interesting, but pathetic for the youngster I thought. Possibly I dislike the name more than I should. Do you remember Benjamin Simonds who used to torment us so when we were kids? Probably my antipathy for the name dates back many years.

I asked Louise if the money had been paid over and she hesitated and said they were rather worried, and they were wondering if small Benjamin could sue for the money if the need arose.

Massachusetts follows the old English idea very strictly that only those persons may sue who are contracting parties. Many states allow a person for whose benefit a contract is made to sue upon it, but we do not. There was the case of the woman whose husband couldn't go by the corner saloon on pay nights and finally the employer agreed with the man that he would hold back a part of his wages each week for his wife. When the employer didn't pay over the promised sums, she was not able to recover regardless of the

fact that the contract was made for her benefit.

Even in this state however, we have recognized a few exceptions to the general rule and among the number is the right of a child to sue on a contract made for his benefit by a near relative. Small Benjamin may, by his father as his next friend, be a party plaintiff in a case against Benjamin Schweitzer. He certainly is entitled to \$2000 if he must bear that name through life.

Are you people still enjoying these legal letters, or are you just being polite?

Lovingly yours,

Mellen v. Whipple, 1 Gray 317;
Gardner v. Dennison, 217 Mass. 492.

Liable or Not Liable?

Dear Frances:

Do you recall the teacher who came to the beach last summer that I might prepare him for the Boston Examinations in Law? Frankly I feel that I must be an exceedingly poor teacher for I failed to put across the simplest of points, namely, that if one enters into a contract one is going to be liable if he breaches it.

Early in October he conceived the idea that he needed a course in physical training and so he searched out an organization which in consideration of three hundred dollars paid over a period of six months, would give him the use of the gymnasium two afternoons a week during the winter, certain massage treatments, and the advice of an attending physician.

He was so enthusiastic that he paid one hundred dollars on the spot and agreed to pay the balance on the fifteenth of December. He expected in the course of a few weeks to be made over physically. However, the demands of daily teaching, the home needs and responsibilities caused him to postpone enjoying the advantages of membership and he has never yet attended a single class. He didn't pay the two hundred dollars due in December and for some time he has received unpleasant letters from a collection agency which insists that he owes two hundred dollars plus interest and he, poor man, was sure that I could not only save him from

further expense, but that I could also get back the one hundred dollars with which he so freely parted. Now I am wondering if I ever did teach any law.

I fear I told him rather brutally that he was stuck and that in all probability they would collect the additional two hundred dollars and the interest and he has decided that there is no justice. I have tried but I cannot make him see that he entered into a binding contract, that the organization is ready and willing to fulfill its promises and that if he has not chosen to partake of the benefits that await him that that is not their responsibility. He has talked with the doctor who is quite willing, note the generosity, to extend his membership but not willing, to cancel his liability. I shouldn't think he would be. He knows Mr. X has money. He naively remarked that he shouldn't think that any doctor would be so small as to insist on holding him, and I told him that any doctor who was unable to make a living out of a legitimate practice and who was forced to run such an establishment would know quite thoroughly his legal rights and that possibly this was a bit of law which he would learn in the school of experience. He simply looked grieved and thinks of me as most unsympathetic. I fear I am just that!

Disgustedly yours,

Homer v. Shaw, 177 Mass. 1;
Turell v. Anderson, 244 Mass. 200.

When A Contract is Performed but The Contract is Not

Dear Mother,

Father has really nothing to worry about. The situation is unpleasant and litigation is a thing to be avoided, but there are times when it is unnecessary to be melted down for the tallow trade as George Eliot expressed the idea.

In Massachusetts if one does not perform the exact terms of the contract, he is not entitled to the contract price but if he has acted in good faith, he has a remedy. When Father substituted maple flooring for oak in the Burnett house, he was not deliberately violating the terms of the contract. The Lumber Company will testify that they had none and could get none at that particular time and time was of the essence.

When an individual acts in good faith, and Father did, he is entitled to the fair value of his services, and as long as he does not sue on the express contract that he did not perform but sues on an implied one, all is well. Don't let him worry over this. Personally, I think Burnett is talking loudly for effect and I don't believe he will ever let the case go to trial.

Try to think of it as one of life's minor collisions. After all, they leave us still unscathed.

This is written hastily, but with much love,

Hayward v. Leonard, 7 Pick. 181;
Bowen v. Kimball, 203 Mass. 364.

The Law Knows Not the Word Impossible

Dear Frances,

Can you imagine a woman eighty-three, who has had little of the world's goods, passing on with these words, "It has been a great show." They were uttered with much reverence and I shall never forget them. Wouldn't we like to be able to feel and say the same thing when all is over?

I don't believe Olive Ball ever acknowledged the existence of the word "can't." She was ever forcing the iron to swim, ever putting over stunts which others felt impossible. She would put iron into the souls of those about her.

Why did I think of her tonight? All day I have been facing people who believed things impossible and with the word impossible sought a legal excuse, but the law knows not the word.

Mr. A, a contractor, had the house all but completed and it was destroyed by fire. Is he excused? No. The completion is not impossible; he must stand the expense of rebuilding.

Mr. B hired a house and agreed to deliver it in good condition at the expiration of the lease. It was struck by lightning and destroyed. Is he excused? No. He still may return it in good condition.

Mr. C took a yacht for the summer and contracted to return it in the condition in which he received it,

reasonable wear and tear excepted. It was destroyed by a typhoon in southern waters. Is he excused? No. If he returns not the boat, he must return the money equivalent.

Mr. D had a safe as security which he was to return upon the payment of the debt. Thieves broke in and stole it. The debt has been paid. Is he excused? No. Money damage must make the debtor whole.

And so the story goes. Mr. E was to deliver lumber from Finland. The World War make it impossible. Was he excused? Not from paying damages for breach of contract.

The law knows not the word impossible. Olive Ball knew no such word in her life, and I'd like to have it said of me some day.

In thoughtful mood,

Adams v. Nichols, 19 Pick. 275;
Scofield v. Barowsky, 249 Mass. 1;
Magnan v. Fuller, 222 Mass. 530.

CONTRACT SUMMARY

A contract is an agreement resulting in an obligation enforceable by law. It may be express, when the parties actually state the terms to each other; implied, when without specifying all the terms, they indicate by their conduct a common intention to contract.

A Formation of Contracts

I Agreement, - usually reached by an offer on one side and an acceptance on the other.

1. The offer may consist of a promise or an act; it must be definite.
2. The acceptance may be by a promise, or an act; but the acceptance must be in the form contemplated by the offeror.
3. The offer must be communicated either by words or conduct.
4. The acceptance ordinarily should be communicated.
5. Care must be taken to be sure that the communication constitutes an offer, that it is not a mere invitation to deal, or statement of intention.
6. Acceptance by mail or telegram dates from the time of mailing or telegraphing if it is a proper acceptance.
7. The acceptance should be absolute, unconditional, identical with the terms of the offer, in the manner specified, within the time specified, and not a counter offer.
8. An offer may be revoked at any time before it has been accepted.
9. The revocation of an offer takes effect when it is received.
10. Death revokes an offer without communication of the fact of death to the offeree.
11. Death does not revoke a contract except for personal services.
12. An offer under seal cannot be revoked.
13. An offer may be made to an individual, to a group of individuals, or to the public, but no contract results until it is accepted by a definite individual with knowledge of the offer. It must be revoked in as public a manner as it is made.
14. An offer lapses without specific notice of revocation when the time specified has passed, or, if no time is specified, within a reasonable time.

II Proper Form, - certain contracts, though possessing the other elements necessary to make a valid contract, must be in a particular form to be enforceable.

1. Contracts under seal, - some contracts derive their validity from the fact that they are under seal, and not from the fact of agreement or obligation.

a. The following should be under seal:

- (1) Conveyances of land, - deeds, mortgages, leases.
- (2) Bonds
- (3) Covenants
- (4) Releases

b. Facts concerning sealed instruments:

- (1) Delivery is necessary.
- (2) Statements set forth in such instruments are conclusive against the parties making them.
- (3) A sealed contract merges all prior simple contracts, whether written or oral.
- (4) The right of bringing suit is barred after twenty years.
- (5) Ordinarily no consideration for an agreement under seal is necessary.

2. Contracts in writing because of the Statute of Frauds, - a statute passed in 1677, during the reign of Charles II to prevent fraud and perjury, - reenacted in nearly all states in this country.

a. Fourth Section:- No action shall be brought upon an oral contract:

- (1) To charge an administrator or executor upon a special promise to pay out of his own estate.
- (2) To charge a person to answer for the debt, default or misdoings of another.
- (3) To charge a person upon an agreement made upon consideration of marriage.
- (4) To charge a person upon a contract for the sale of lands or any interest in or concerning them.
- (5) To charge a person upon an agreement that is not to be performed within one year.
- (6) To charge a person upon a promise to pay a debt discharged by bankruptcy or barred by the statute of limitations. G.L. c. 259, s.3; G.L. c. 259, s.13.
- (7) To charge a person upon a promise to make a will. May 17, 1888. G. L. c. 259, s.5.
- (8) To charge a person upon representations of credit.

b. Seventeenth Section:-

- (1) This section may be satisfied in any one of three ways, - acceptance and receipt, earnest or part payment, written memorandum.

c. The Writing which will satisfy either section of the Statute.

- (1) The promise, contract, or agreement or some memorandum of it must be in writing.
 - (a) Signed by the party to be charged or his agent; and must indicate at least the other party.
 - (b) It must express the substance of the contract with reasonable certainty.
 - (c) It need not be delivered or intended as a memorandum and it may be made any time prior to suit.

III Consideration, - a change of legal status.

1. Any valuable consideration will support a contract regardless of the relative value of the goods or services exchanged except:
 - a. In case of an exchange of money values when inadequacy of consideration is a defense, or
 - b. In Equity where specific performance will not be granted if the consideration is unjust or inadequate.
2. Consideration may consist of a promise, an act, or an agreement to forbear from doing any act which one can legally do.
 - a. In Massachusetts an agreement to forbear suit must always be proven.
3. Doing what one is bound to do is as a rule no consideration.
 - a. Such a promise often takes the form of part performance of an obligation in consideration of a release of the remainder, - not good unless:
 - (1) the release is under seal, or
 - (2) it represents a compromise of an unliquidated claim, or
 - (3) something additional to the original obligation is done or promised.
 - b. Similar questions arise in promises for additional compensation for work already contracted to be done.

Generally

 - (1) one furnishes no consideration when he agrees to do for a larger sum what he has already agreed to do for a smaller sum.
 - (2) According to the N. Y. rule one has the right either to perform or to respond in damages, and if one gives up his right to respond in damages he thereby furnishes consideration for the additional amount.
 - (3) Massachusetts holds to the first rule on the theory that one must perform and has no right to respond in damages. However, there is an attempt to find in this state a substitution of a new contract for the old.
4. Consideration must be definite, though it may be conditional.
 - a. The test is whether the acceptance imposes any obligation on the acceptor.
5. Consideration must be present or future, not past.
6. In Massachusetts only those who are parties to the consideration may sue according to the general rule.

IV Capacity of parties.

1. Contracts of infants are either valid, or voidable.

a. Valid contracts

- (1) An infant is liable for the fair value of his necessities.
 - (a) Circumstances determine what shall be necessities, but necessities must concern the infant's person and not his estate.
 - (b) Money itself is not a necessary unless expended under the direction of the lender for necessities.

b. Voidable contracts

- (1) The infant has the right to ratify or disaffirm his voidable contracts.
 - (a) Ratification to be binding should be made at maturity. Knowledge that the infant could avoid is not essential to make ratification good.
 - (b) Mere acknowledgment of a debt does not constitute ratification, but a promise to pay may be either written or oral, in this state.
 - (c) Lapse of time after coming of age coupled with enjoyment of the proceeds of the contract, is sufficient to warrant an inference of ratification.
 - (d) Silence after coming of age will constitute ratification in situations involving continuous rights and duties.
- (2) Both executory and executed contracts may be disaffirmed, but executed contracts as to real estate can be avoided only when the minor becomes of age.
 - (a) In Massachusetts if the infant still has the consideration he must return it, but if he no longer has it the other party is without a remedy.

2. Contracts of insane persons stand on about the same plane as contracts of an infant.

- a. An insane person is liable for necessities, and the term is extended to include necessities for his estate as well as his person.
- b. The contracts of an insane person may be avoided by himself if he becomes sane, by

his guardian, or by his heirs and representatives after his death.

c. Knowledge of insanity by the other contracting party is immaterial in this state.

d. If there has been an adjudication of insanity all contracts are void.

3. At common law the contract of a married woman, except for personal services, was absolutely void, and not merely voidable, even for necessities. Various statutes define her position today.

a. She may freely contract with all except her husband. G. L. c. 209, s.2.

b. She is jointly liable with her husband for necessities furnished to herself or family with her knowledge up to \$100 in each case if she has property to the amount of \$2,000 or more. G. L. c. 209, s.7.

c. Gifts of personal property and conveyances of real estate between husband and wife shall be valid to the same extent as if they were sole except that no such conveyances of real estate shall have any effect until recorded. G. L. c. 209, s.3.

d. If she is engaged in business she should file a married woman's business certificate in the city clerk's office, otherwise her husband will be liable for her business debts and her personal property used in the business will be subject to his debts. G. L. c. 209, s.3.

V Reality of Consent, - requires a real meeting of the minds of the parties.

1. Mistake, - covers only such mistakes as are made without misrepresentation or fraud.

a. Mistake on the part of one party will not ordinarily avoid a contract; if the minds have really met it is not necessary that either should get what he thinks he is getting.

b. Mistakes which will justify rescission.

(1) A mistake as to the nature of the transaction.

(2) A mistake as to the identity of the person with whom the contract is made when such identity is material.

(3) A mistake as to the subject matter of the contract if it be a mistake as to the existence or identity of the subject matter, or a mistake as to the nature of a promise, which mistake is known to the other party.

(a) A mistake as to the value of the subject matter does not make the

contract voidable.

- (4) A mistake of law does not generally justify annulment, but a mistake as to the law of a foreign state is considered as a mistake of fact rather than one of law.

2. Misrepresentation

- a. An innocent misrepresentation will not ordinarily serve as a basis for avoidance unless the misrepresentation is itself incorporated as a condition of the contract.
- b. Whenever there is a special relationship of confidence between the parties, as between guardian and ward, trustee and beneficiary, principal and agent, and whenever one party expressly or by necessary circumstances relies upon another for accurate statements, as in case of insurance, an innocent misrepresentation will justify the other party in repudiating the contract even at law.

3. Fraud, - always justifies the repudiation of a contract. The following elements must be proved:

- a. A misrepresentation of a material existing fact, which includes concealment when there is a duty of disclosure;
- b. Made with a knowledge of its falsity, or with reckless disregard of truth or falsity, or of the person's own knowledge, when in fact he had no such knowledge;
- c. With the intent that the representation shall be acted upon by the other party;
- d. And it was acted upon by such party to his damage.

4. Duress and 5. Undue influence operate to make impossible a real consent to the contract.

- a. Duress is actual violence or imprisonment or threatened violence or imprisonment by which a person is forced to enter into a contract against his will. It must be inflicted on the contracting party or on a near relative.
 - (1) Even though obtained under duress a creditor cannot be deprived of a settlement of a genuine claim. The debtor has done no more than he was legally bound to do.
- b. Undue influence is a species of fraud, an abuse of confidence by one in trust relationship or in authority, by taking advantage of another's weakness of mind. It must amount to a dominion over the will of the person so influenced so as to destroy his free agency.

VI Legality of Subject Matter, - an agreement does not result in a valid contract if its object is illegal.

1. Illegal contracts divide into four general classes:

a. Contracts violating the rights of the state

- (1) A contract made in violation of a statute which prohibits the doing of an act and imposes a penalty.
- (2) A contract made between persons of warring countries.
 - (a) If made prior to war, - suspended.
 - (b) If made during war, - void.
- (3) A contract involving the violation of the laws of another state or nation.

b. Contracts violating the rights of the public.

- (1) A contract made and completed on Sunday.
 - (a) If goods in pursuance of a Sunday contract are delivered on a week day there can be recovery on the basis of an implied contract, but not on the basis of the express contract made on Sunday, or the seller may replevy the goods.

- (2) Wagering contracts. See G. L. c. 137, s.1.
- (3) Contracts tending to injure public service in election or appointment of officials.
- (4) Assignment of salaries not yet earned by public officials.
- (5) Agreements tending to obstruct justice.
 - (a) Stifling prosecution.
 - (b) Ousting courts of justice; this results when legal liability is to be determined solely by a board of referees.
 - (c) Maintenance and champerty.
- (6) Contracts in restraint of trade.
 - (a) Upheld if reasonable even if unlimited in time and space.

c. Contracts violating the rights of the individual.

- (1) Involving a breach of trust.
- (2) Involving fraud of creditors
 - (a) Any agreement whereby one creditor is to receive more than other creditors is unenforceable.
 - (b) In Massachusetts such agreement renders the whole composition void and other creditors can recover their entire claim.
- (3) Publication of libels.

d. Contracts violating public sentiment.

- (1) Agreements involving immorality
- (2) Interference with marriage.
 - (a) Restrictions which apply to second marriages are valid
 - (b) Marriage brokerage contracts are illegal.

B Operation of Contracts.

I Conflict of Laws.

1. The law of the place where the contract is made, generally governs its validity and interpretation. To the rule there are exceptions:
 - a. The law of the place where the land is located, governs the validity of a contract relating to real estate.
 - b. The law of the place of performance, governs the validity of a contract which is made in one jurisdiction but to be performed in another.

II Parties to contracts

1. Ordinarily a contract imposes neither liability nor confers rights upon persons who are not parties to it. Certain exceptions may be noted.
 - (a) Where money or goods are wrongfully in the hands of another the law will impose a quasi contractual liability for the benefit of the true owner.
 - (b) In Massachusetts a beneficiary under a trust agreement may enforce the trust, hence has rights conferred upon him.
 - (1) By statute a beneficiary on a life insurance policy may sue on the policy in his own name. G. L. c. 173, s. 125
 - (c) A person not originally a party to a contract may sue upon it if it has been assigned to him by act of one of the parties or by operation of law.
 - (1) Credits in money or goods may be universally assigned, but liability upon a contract can not be assigned unless,
 - (a) the other party assents,
 - (b) the contract involves work requiring no personal skill.
 - (2) Assignment should be in writing; no special form is necessary.
 - (3) In case of conflict between successive assignees the first assignee in Massachusetts is entitled to the property. See G. L. c. 154, s. 2-5
 - (4) Assignees take subject to equities against their assignors.

III Joint and several contracts.

1. Joint contracts

- a. All should be sued though each is liable for the

full amount.

- b. If one joint, or joint and several promisor is released, the effect is to release all.
- c. When joint parties are promisees they are entitled to performance jointly, and should sue jointly.
- d. If one joint debtor pays the entire debt, he may enforce contribution from the others.

2. Several contracts.

- a. The parties cannot sue or be sued jointly
 - (1) By statute "all or any of the persons severally liable upon written contracts may be joined in one action." G. L. c. 231, s. 4

3. Joint and several contracts

- a. Suit may be brought by or against all jointly, or by or against each severally; less than all can not sue or be sued jointly in joint and several contracts except in case of the death of one.

V Discharge of Contracts

1. By agreement

- a. Waiver, rescission, cancellation.
- b. Substituted contract; change of terms or parties, - a novation.
- c. Condition subsequent, where the contract contains in itself express or implied provisions for its determination, such a discharge may take place:
 - (1) By reason of the nonfulfillment of a specified term of the contract;
 - (2) By the occurrence of a particular event; or
 - (3) By the exercise of an option.

2. By performance

a. By performance of the conditions.

- (1) At common law a strict performance of the terms of the contract was required and in Massachusetts the strict rule is applied as to conditions precedent.
- (2) Today if a party who has performed the contract has deviated slightly, but not wilfully, he is entitled in Massachusetts to recover the value of the benefit which he has conferred upon the defendant by reason of his work, labor and materials, i. e., upon a quantum meruit.

b. By payment

- (1) A negotiable instrument is held to be a complete discharge unless a contrary intent appears.
- (2) Payment on account must be applied as the debtor directs.
- (3) Otherwise it may be applied to the earliest legal debt by the creditor, or to the earliest legal outstanding debt by the court.

c. By tender

(1) If money is tendered which is not accepted the party tendering must keep the tender good; such tender prevents the running of interest and costs.

(2) If service is tendered and refused the promisor is discharged from the obligation of his contract.

3. By breach of the obligation which the contract imposes.

- a. A breach always gives to the injured party a right of action for damages, and it often, but not always discharges the contract.
- b. Renunciation operates to discharge a contract if the other party so elects, but because of the rule of anticipatory breach, there is no recovery in this state before the time of performance.
- c. In all states, when a breach occurs during the time when a party is entitled to performance, he may sue for future as well as past damages.
- d. Whenever the breach is wilful or goes to the essence of the contract the other party is justified in considering the contract discharged.

4. By impossibility of performance.

- a. Impossibility of performance arising from subsequent events not contemplated by the parties at the time of the making of the contract will not ordinarily relieve the party from his obligation.
- b. There are three exceptions to the general rule:
 - (1) Impossibility created by law unless the parties could reasonably have been supposed to have contemplated such action of the courts or legislature at the time they entered into the contract.
 - (2) Where the continued existence of the specific thing is essential.
 - (3) A contract which has for its object the rendering of personal services is discharged by the death or incapacitating illness of the promisor.

II In the realm of Agency,- when we would act through another.

1. The law tersely stated.

Those who through another, as their agent, do
an act,
Are deemed to be the ones who in reality contract,
The agent's but the instrument by whom the act
is done
The principal employs him, thus the act is his
alone.

Latin Maxims
Foster

Quid facit per alium facit per se. He who
does a thing by another's agency does it
himself.

Coke

Qui sentire commodum sentire debet et onus

If you authorize your agent to sell in your name,
Your goods, and if the buyer, bona fide, has a
claim
Against the agent, you are liable, for it is plain
That "he who reaps the benefit the burden should
sustain".

Latin Maxims
Foster

Who May Be Principals and Who May Be Agents

Dear Mr. Cronin,

In the olden days they talked about masters and servants, but we, in this land, don't care to be servants, and prefer to consider ourselves as agents for others. Likewise we object to calling any one master, and so we designate our superior as a principal, but in many situations there is little difference between the law of Principal and Agent and the law of Master and Servant.

There are no special requirements for an agent, no more than there are for a principal; he may be of either sex, and of any age. However, even though you feel that Charles Grant, your nineteen-year old clerk, has wilfully breached his agreement with you by leaving your employ and going to work for your competitor, you are liable to him for the fair value of his services to date. You are right in feeling that had one of the older men done the same trick he would not be entitled to back pay. When an adult wilfully breaches his contract the other party can consider himself as without further liability, but inasmuch as an infant can avoid with impunity any contract, he can avoid without liability his contract of agency and recover the fair value of his services. Moral--don't hire a minor!

Sincerely,

Whitney v. Dutch, 14 Mass. 457.

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Sincerely,

Whitney v. Hatch, 14 Mass. 457.

The Married Woman the Agent of Her Husband

Dear Weldon,

The liability of a husband to support his wife continues even though she no longer is living under his roof if she has really left for a justifiable cause, and I tell you very frankly I think Ann has had cause. Of course, there is always fault on both sides, and your case is no exception to the general rule but you have ever been moody, taciturn and disagreeable. For the past ten years, Weldon, I have never been a willing guest at your dinner table for I have not enjoyed the hateful, spiteful, sarcastic remarks you ever felt called upon to hurl in her direction, and although Ann has been silly and frivolous and all that, I have seen her cringe under your tongue lashing in a way I don't care to observe. There have been plenty of times that I have thought a wholesome spanking would do you good. I am sorry, Weldon, I am fond of you and ever have been since you were a pupil in my first school back in the dark ages, but I cannot but feel that you have made a mess of things.

So Ann told you when she left that she wouldn't run up bills exceeding twenty-five dollars a week. Evidently, she has been better advised and the Chandler bill and the other store bills for clothing for herself and Weldon Junior, and household supplies would not seem excessive for people in your station of life. A wife may be an agent of her husband because he expressly authorizes her to act for

him, or she may be his agent impliedly when she buys things for the household or she is his agent through need when he fails to furnish her with the things necessary for life, the food, the shelter, the clothing suitable to her position in the community.

We often say that the act of the agent is the act of the principal, meaning simply, that he will be bound by it. That is your situation, Ann is your agent, and within reason, her acts will still obligate you. No agreement that you people make together will bind because as your wife she cannot contract with you. Therefore the seeming contract into which she has entered is worthless.

You ask if it will do any good to publish a notice in the newspaper--"So and so, my wife, having without just cause left my bed and board, etc." Not much, Weldon. You would still be liable for the things which are necessary to her in her station of life. It would seem to me to be more of a stooping than you with your sensitive nature would care to indulge in.

I doubt if you people have grounds for a divorce. She might apply for separate support, that she was living apart for justifiable cause and under that decree your financial problems would be adjusted. There is another way if you want to keep out of the courts. You two can enter into a separation agreement with a third person as trustee and under the terms of such agreement she would be bound as well as yourself. It would enable you both to know where you stand and if you

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people are determined to destroy the home, to allow the child to suffer, and each go your selfish way this is a solution to your problem.

Forgive me. I have probably forgotten that you are a business man of prominence in the community, and am seeing you only as a wilful, spoiled boy, but, Weldon, you deserve all that I have written and more.

With pity,

Groce v. First National Stores, 268 Mass. 210;
Benjamin v. Dockham, 134 Mass. 418;
Conant v. Burnham, 133 Mass. 503.

Some months ago a salesman, new to the territory, went into the store, inquired for Mr. Collins, and was told by the man behind the counter that he was Mr. Collins. Thereupon the salesman displayed his wares. Mr. Collins, the clerk, ordered levishly. The goods arrived, but the old man was stubborn. He refused to foot the bill on the ground that he had never ordered the goods and that the clerk had no authority. The company took it to court and they won their case last week on the ground that Mr. Collins, the proprietor, was estopped to deny that the younger man was his partner for whose acts he would be responsible.

Estoppel is a bar raised by law to prevent a man from taking an inconsistent position. Think it over. Was the court decision correct?

Hastily yours,

B. Pilott v. Raymond, 137 Mass. 373;
Dorsey v. W. E. Tal., 275 Mass. 475.

The Meaning of Estoppel

Dear Leon,

Do you recall the young upstart, Collins, that used to work in the Collins Dry-Goods Store on Warren Street? He has been there all these years, and I have always liked him about as well as we did in other days but the old man has relied more and more upon the younger man.

In fact, people have wondered if he really were not in the firm for he has taken unto himself more and more the sense of proprietorship, apparently with the old man's knowledge and approval. However, the community now knows the situation.

Some months ago a salesman, new to the territory, went into the store, inquired for Mr. Collins, and was told by the man behind the counter that he was Mr. Collins. Thereupon the salesman displayed his wares; Mr. Collins, the clerk, ordered lavishly. The goods arrived, but the old man was stubborn. He refused to foot the bill on the ground that he had never ordered the goods and that the clerk had no authority. The company took it to court and they won their case last week on the ground that Mr. Collins, the proprietor, was estopped to deny that the younger man was not his partner for whose acts he would be responsible.

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Hastily yours,

Bartlett v. Raymond, 139 Mass. 275;
Mentzer v. N. E. Tel., 276 Mass. 478.

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the court decision correct?

Respectfully yours,

Hartford v. Raymond, 132 Mass. 371;
Hartford v. W. E. Tal., 132 Mass. 478.

Apt Signing to Avoid Liability

Dear Mr. Dennett,

Will you forgive me if I offer advice before any is requested?

I was home over the week-end and while in the store Saturday night, I read the notice offering the \$1000 reward for information leading to the arrest and conviction of the individuals who broke into the Post Office several weeks ago. That notice is signed

Fred Dennett)
 Samuel Olson) Selectmen of the
 John Bradford) Town of P-----

May I suggest that you take it down and change it somewhat?

I'll tell you a secret. The signing on that paper binds you people personally and the money could be collected from you rather than from the town.

Whenever the word, "Agent," or "Agent of" appears after the name, the word or words are considered merely descriptive and the individual personally liable. One can accomplish very unexpected results by his method of signing instruments.

Let your notice read, "Town of P-----, by its selectmen, Fred Dennett, Samuel Olson, John Bradford" and all will be well.

I hope you don't mind the hint.

Legally yours,

Haverhill Ins. Co. v. Newhall, 1 Allen 130;
 Jump v. Sparling, 218 Mass. 324.

Reciprocal Duties of Principal and Agent

Dear Jack,

So you have gone to work for Thompson, and you are to sell his product throughout the Maine territory. Good luck to you, but don't forget that you have taken on new rights and new responsibilities.

You have a right to expect compensation, of course, and also a right to be reimbursed for expenditures that you reasonably incur in carrying out his work. Note the word "reasonably." Sometimes, agents expect to recover back sums spent because of their own wrongdoing, and that is impossible.

You owe to old man Thompson intense loyalty, complete devotion to his products, the duty of obeying instructions whether you like them or not, the duty of serving him wholeheartedly.

One cannot serve two masters in the field of business any more than he can in the field of religion. Don't use any money which belongs to him, never mix the collections with your own funds, and don't get others to do the work assigned to you.

Many men on the road cannot stand the test; they are people who need constant supervision, who know not how to use freedom. The result is that they lose their grip and go to pieces. Don't follow the crowd unless the road is one of which you approve.

Thompson will be bound by the contracts you make within your express or ostensible authority--ostensible

authority is the authority the world believes you possess. He will also be liable for the careless blunders you make, the misrepresentations, in short, the torts you commit while about his business.

He is recognized as a hard task master, but a just man. Make good, play the game straight, don't charge the trip to New York up to expenses, don't spend a week in Portland with Louis and his family and charge it up as hotel fee, don't stoop to sharp practice! He may never know, you may be smart enough to get away with it, but it will be a type of smartness that will mean your ruination from the standpoint of character.

Good luck,

Wheelock v. Zevitas, 229 Mass. 167;
 McIntosh v. Abbot, 231 Mass. 180;
 Russell v. Klein, 227 Mass. 297;
 Elliott v. Kazajian, 255 Mass. 459;
 O'Leary v. Fash, 245 Mass. 123.

Death Revokes the Agency.

Dear Leon,

The deed isn't good and if the heirs of Johnson don't want to sell the "Goose House" at Pemaquid you will have to find another attractive place. Because the deed is no good they must return to you, however, the \$2500 you paid.

The real estate man was properly authorized to find a customer, and he also had authority to give a deed. The agreement to convey and the deed are in perfect form but, Leon, don't you realize that Mr. Johnson died the night before that agreement to convey was signed and four days before the deed was executed? The fact of death remains even though the real estate man had no knowledge for more than a week. He was only Johnson's agent, his right hand as it were, and with Johnson's death his right hand died too. In other words his authority was gone at the time the agreement to sell was signed and therefore the agreement amounted to nothing as likewise does the deed.

If the agreement to convey had been executed prior to his death, then I would say you could force the heirs to give you a deed of the place for a contract, except for personal services, is not affected by death but under the circumstances you can do nothing unless the heirs desire to sell to you. You are not the only person disappointed. The real estate man is losing a commission too, and commissions these days are few and far between. My advice to you is to

talk with the heirs and perhaps you may be able to do business with them.

Sincerely,

Mulloney v. Black, 244 Mass. 391;
Lincoln v. Emerson, 108 Mass. 87.

THE LAW OF AGENCY

The law of agency involves the relation between principal and agent and between both and third parties with whom the principal deals through his agent. The law of principal and agent is very similar to the law of master and servant, but an agent is actually or impliedly authorized to make contracts for his principal while a servant is chiefly engaged in performing mechanical acts for his master.

A Forming the Relationship of Principal and Agent.

I By Contract,--with the ordinary elements of a contract present.

1. Under proper form note the following:

- a. An agent may be appointed orally, although it is contemplated that he will exercise his authority in writing.
- b. If the contract between the principal and the third party must be under seal, the authority of the agent must be sealed. To this rule there are the following exceptions:
 - (1) If the act is done in the presence of the principal it is his act and the question of form of authority does not arise.
 - (2) If the instrument is in fact, although the law does not require that it should be, under seal, the authority does not have to be under seal.
 - a. An insane person, if not judicially declared insane, may appoint an agent, but the appointment will be voidable.
 - b. An infant may be a principal, but both the acts of his agent for him and his own contract of employment with his agent are voidable.
 - c. A married woman may today be either a competent principal or an agent. Her husband can be her agent only by her express authority, but she may be his agent expressly, or impliedly for household goods, or by necessity where he fails to furnish her with the necessaries of life.

II By an agreement short of contract,--consideration lacking.

1. In such event, there is no obligation upon either of the parties to execute the terms of the agreement, but if the agent begins performance of the agency he will be liable for its improper execution.

III By ratification.

1. If one does an act for another without authority, the person for whom such act is done may afterwards ratify the act done so as to give it the same legal effect as if it had been originally authorized.
2. Such ratification dates back to the time of the act; it

is analogous to acceptance, and hence is irrevocable.

(a) The rights of intervening strangers, such as creditors, cannot be cut off by this means, and third persons may recede from the contract at any time prior to ratification.

3. The principal must be an existing person capable of being ascertained, and the contract must have been made in his name and in his behalf.

IV By estoppel. This is the ostensible, apparent or implied agency.

1. Three elements should appear:

a. The principal is at fault in allowing this person to appear to be his agent.

b. The third person has been honest and reasonable in believing him an authorized agent.

c. As a result of the misleading the third person has been damaged.

2. Estoppel may go to the existence of the agency or to the extent of the agency.

3. One who deals with an agent acting within the apparent scope of his authority is protected.

4. A third person may assume that the agent has the powers necessary for the execution of powers actually conferred; the powers annexed by custom or usage; and any other powers which the principal reasonably leads the third person to believe that the agent possesses.

V By necessity.

1. In addition to actual authority and ostensible authority, a wife has an agency by necessity to obtain those necessities of life for her support which her husband has neglected or even refused to furnish her.

a. An infant has life agency by necessity to bind his father for necessities which the father has failed to provide.

b. The doctrine is often extended to cover the employment of medical assistance in cases of extreme need, particularly in railroad accidents.

B Operation of Agency

I Duty owed by principal to agent.

1. Compensation for services. In cases of services rendered by relatives there must be an express promise to pay.

a. If the agent is rightfully discharged for his own fault he sacrifices his compensation, but if he is wrongfully discharged he may collect damages.

2. Repayment of advances or losses, incurred by the agent in the prosecution of the principal's business.

II Duty owed by the agent to his principal.

1. Obeying instructions. Failure to obey may make the agent liable for damages or for conversion.

2. Exercising the skill and judgment which he has agreed to use or which he has held himself out as having.

3. Acting in good faith, which implies that he will not take a position antagonistic to his principal.

4. Accounting for all proceeds whether obtained directly or indirectly.
5. Acting in person unless otherwise authorized. He to whom a duty is delegated can not delegate it.

III Duty of the principal to third persons.

1. Liable upon all contracts made by the agent within the scope of his actual or ostensible authority.
2. Liable for the torts of his agent committed within the scope of his authority and in the execution of his employment.
 - a. It makes no difference whether the tort was wilful or for the benefit of the agent alone as long as it was within the scope of the authority.
 - b. In case of a servant loaned liability rests upon the master who is in complete control.
 - c. The rule extends to torts of sub-agents if they have been appointed under due authority.
 - d. The rule does not apply if the servant or agent has deviated from his employment and gone on an independent frolic of his own.

IV Liability of the agent to third persons.

1. An agent who has contracted on behalf of a principal is not liable if he was duly authorized.
 - a. If his authority was lacking he may be liable to third persons who did not know the facts, upon the theory that he warrants his authority when he contracts with them.
2. In case of torts, an agent may always be personally liable if the third party so elects.

C The Doctrine of Undisclosed Principal.

I Liability of an undisclosed principal.

1. When the agent is acting for a principal whose name he does not disclose, this undisclosed principal is ordinarily liable to third persons to the same extent as is a disclosed principal.
2. If the third person elects to regard the agent as the sole contracting party, as he may do, he cannot later proceed against the principal.
 - a. He has made his election when with knowledge of the existence of an undisclosed principal he has carried suit against the agent to judgment.
3. If a contract under seal is sealed by the agent in his own name, the principal is not liable.
4. In case of negotiable instruments, only those persons whose names appear on the paper may be held.

II Right of an undisclosed principal.

1. Ordinarily he may bring an action in his own name against the third person who supposed that he was dealing with the agent as principal.

D Termination of the Agency.

I Termination of the agency may be brought about:

1. By fulfilment of the contract of agency or by agreement,-- the purposes have been fulfilled, or the time of its

duration has elapsed.

2. By operation of law.

- a. The subject matter changes or is destroyed.
- b. The subject matter becomes illegal.
- c. The parties become incompetent by death, bankruptcy, or insanity.
- d. War between the country of the principal and that of the agent.

3. By revocation.

- a. The principal may ordinarily revoke the agency, or the agent renounce it at will. True even though the revocation operates as a breach of the contract for which damages may be recovered.
- b. In the following case the agency is irrevocable:
 - (1) Where the agent has a power coupled with an interest.

III With Credit Instruments, Bills, Notes, and Checks.

1. Important points summarized.

THE INEXPERIENCED ADVOCATE

and

THE HOLDER IN DUE COURSE

An Inexperienced Advocate was once Requested by a Learned Friend to "Devil" a Short Cause. As he had Never Raised his Voice in Court (except to Apply for a Case to Stand Out of the List till next Sit-tings, Keeping its Place) the Inexperienced Advo-cate was Rather Alarmed at the Prospect. But, being Ambitious, he Agreed to Do his Best. He Gathered that he was to Appear for the Defendant, and that the Plaintiff was the Holder in Due Course of a Bill of Exchange. Also that he was to Knock the Plaintiff About a Bit in Cross-Examination. Pulling himself Together he Went into Court and the Case was Soon Called on. The Plaintiff had a Slightly Red Nose and his Linen was not Unimpeach-able, but he gave his Evidence Clearly and in a Firm Voice. When he Rose to Cross-Examine the Plaintiff, the Inexperienced Advocate Shook Very Much, Particularly at the Knees, and the Court seemed to be Spinning Round and Round. The Judge and the Plaintiff Completely Disappeared from his Vision and were Replaced by Strangely-Coloured Sparks and Chaos. His Jaw Dropped and his Eye was Glazed. He Became Unconscious of his Surroundings. The Plaintiff was so Horrified by the Inexperienced Advocate's Appearance that he Completely Lost his Nerve. Asking in Faltering Tones what he was Looking at him like That for, the Plaintiff Added that he had been a Respectable Man Ever Since..... Here he Paused. But the Judge Took up the Running and Before the Inexperienced Advocate had Recov-ered his Senses, the Plaintiff had Admitted that he had been Convicted of Fraud on Divers Occasions, and the Judge had Given Judgment (with Costs) for the Defendant. The Defendant's Solicitor was so Delighted with what he Regarded as a Splendid His-trionic Display that he thereafter Showered Briefs upon the Inexperienced Advocate.

Moral -- Silence is Golden.

Forensic Fables.

The Woman and Her Check Book

Dear Althea,

Thank you for the check in payment for the book I sent you last week. I was interested to see that you were using a check book and judge that it has come along with the teaching position. Personally, I feel a working girl is very wise to deposit her salary and pay her bills in turn by check.

If she keeps the stubs filled out, she has a complete record of her expenditures and can quickly know her financial standing, and I have ever found that if I had to draw a check for spending money I was a bit careful to figure on how little I could get along. There is a tendency if one has much ready cash to let it slip through his fingers without knowing for what it has gone, particularly when one is paid but once a month. Then again loose money is readily lost or mislaid.

There is another thing that I hope you have done or will do if you have not already, do start a budget system. There are excellent books on the subject and the time is coming when a course on "Money Management" will be given in every school. If you learn to budget your income you will be moving toward an appreciation of wise money handling. I wonder if bad spending habits are not responsible for a lot of the unhappiness of the world.

With a well planned budget and a well kept check book I shall feel that you are on the road to at least one kind of success.

Just a few things, Althea, about your checks! Be sure that your words and figures are ever in harmony for if there were a discrepancy, the words would prevail. Place your figures close to the dollar sign so there is no opportunity to slip in another figure, and be sure that the line on which the words are written is wholly used up, if not by the words with a line.

Don't do what I did last week, Althea! I gave a doctor a blank check, that is, I left the amount blank for him to fill in. It probably was a very nice gesture of faith, but it was a very, very foolish thing to do for I would be liable for whatever amount he wrote in. I am almost as bad as the woman who promptly wrote her name on every check when she got her book and then announced triumphantly that she guessed that book would not be lost. If it were she had authorized the finder to fill in the blank spaces to suit himself, and if the checks were passed on to innocent third parties she might find herself in most unfortunate predicaments.

This is a case, Althea, of do as I say and not as I do. A dumber thing I cannot conceive of.

May the school year go most happily.

With appreciation,

Burnham v. Allen, 1 Gray 498;
Libby Trust Co. v. Tilton, 217 Mass. 462.

Bearer Paper or Order Paper, What Does It Matter?

Dear Althea,

Your letter telling me of the budget was fine. I am glad that one check a month is to go into the saving bank!

You ask about drawing checks for spending money. Draw this to your own name rather than to "bearer." It is safer as a whole. When drawn to your name the bank will require you to indorse the check on the back because it has become order paper and order paper can only be negotiable by delivery and indorsement; that is, no one could get title unless it had an indorsement upon it.

Bearer paper--that is, paper made out to bearer, or cash, or sundries, can be passed on by delivery alone and you, the maker, are probably liable to any person in whose hands it may come, but if it is order paper, made out to the order of a specified person, your liability never extends to a person unless he can first show a claim of title which can only come through indorsement and delivery.

Is this understandable?

Sincerely,

Patton v. DeVeney, 259 Mass. 100;
Shaw v. Smith, 150 Mass. 166.

What To Do With Checks.

Dear Mrs. Allen:

During the past two years people have found themselves in very unfortunate predicaments, if they have not promptly put checks into the bank for collection. This is because of a law which provides that unless a check is placed in the bank for collection within twenty-four hours after it is received by the original payee the drawer of the check will be excused to the extent that he can show he has suffered by the delay.

For example if I should receive a check from you on Wednesday morning I really should put that check into the bank for collection before the close of banking hours on Thursday. If I do what we are so liable to do, namely, hold the check until some day next week, and then offer it for collection to my bank, and I am told that the bank on which it is drawn stopped all payments on checks the Friday before, I should realize that I will be the loser and that the person who gave me the check will not be responsible beyond any dividend which the closed bank may pay. This is because the bank was open during the entire day on which I should have put the check in for collection and had I presented it on Thursday I would have gotten my money without fail. Hence it follows that because of my own negligence the check remains unpaid and surely the individual who gave the check in good faith should not be penalized because of my carelessness.

Yours is the experience of many people during this period of banks closing and I wish I could tell you that the man who gave you the check is really responsible, but he isn't. If he pays you the amount of the check it is merely because he recognizes a moral, rather than a legal, obligation. I know that this sounds harsh but if you think of it from his standpoint you will recognize that it is justice.

Sincerely,

How to Endorse Your Checks.

Dear Mrs. Black:

You have asked me concerning the proper way in which to endorse checks and I would suggest that whenever you pass a check on to another person that you would be wise to endorse it specially. By that I mean write on the back of the check "pay to the order of So and So", and sign your name. That means that the only person who can cash that check is the individual whom you have named or some person to whom she has again endorsed the instrument. So many people endorse checks indiscriminately by simply putting their name upon the back. This we call blank endorsing.

Remember that every person who endorses makes certain warranties, and in almost all cases promises that if the maker does not pay, and the proper steps are taken, that he will pay. If, therefore, one endorses a check in blank he really promises to pay to all the world and even though the check was lost or stolen, one might find himself obliged to pay the stipulated amount.

There are also three other kinds of endorsements which are used. The qualified endorsement arises when one signs his name and follows it with the words "without recourse". That person is simply saying that he does not intend to be liable upon that particular check even though the maker does not pay, and it would seem a very satisfactory way to endorse instruments were it not for the fact that the

person to whom he passes the paper frequently will object. Moreover, whether he endorses that way or not he still warrants to all people that the instrument is genuine, that prior parties had the power to contract, that he had good title and that he knew of no defect impairing the obligation of the instrument, and so, although he could not be caught upon the instrument itself he might easily be made responsible for breach of warranty should there be any forged endorsement of which he was unaware or should there have been any endorsement by a minor prior to his. So that method of endorsement is not as satisfactory as it seems.

When one sends paper to a bank for deposit or collection he should endorse that instrument, "Pay to the First National Bank for deposit" and sign his name, or, "For collection." By so doing he has endorsed the instrument restrictively and any person who takes the paper after that endorsement holds merely as his agent. If he collects the money he must hold it for the purposes indicated by the restrictive endorsement. When we speak in legal parlance we say that such endorsement prohibits further negotiations and by that we mean that no person would be what is known in the law as a holder in due course and thus possess perhaps even better rights than the one who transferred to him.

There is a fifth type of endorsement but it is one which is rarely seen or used. For example, I say "Pay to Jones when he paints my house." Now that means that I am

not going to be liable to Jones or any subsequent holder of the instrument unless the house has been painted, but there is no reason at all why Jones or subsequent holders could not recover from the maker of the instrument or endorser who preceded me whether the house has or has not been painted.

Perhaps all this seems very technical, and if questions come to your mind I shall be very glad to write further, but I would say don't endorse checks in blank, and whenever possible endorse them restrictively so that each person thereafter is acting really as your agent in getting the money. There is another thing which is much upon my mind, and had not this letter already become too long I should have written to you of the danger of holding checks. We are very prone, I think, to collect checks and not promptly turn them into the bank for collection. When we do so delay, particularly in these grave times, we take a very great chance. I will take opportunity to tell you more along this line in a later letter.

Truly yours,

Freeman's Bank v. Nat'l. Tube Works, 151 Mass. 413;
 Aronson v. Nurenberg, 218 Mass. 376;
 Pelonsky v. Wattendorf, 255 Mass. 558.

The Endorser and His Warranties

Dear Althea,

Our correspondence this winter seems to center around negotiable instruments, doesn't it?

You didn't realize that if you wrote your name on the back of a note that that simple act made you liable if the maker didn't pay. It really does unless you endorse "Althea Fulton without recourse." In that case you do not promise to pay the instrument if the party primarily liable does not, but nevertheless you warrant four things.

Jane Alden loaned her husband \$500 after they were married to put in that extension irrigation system which they never used after it was installed. It was just one of their many wild ideas. He gave her a note for the \$500 dated six months ahead because he expected by that time to have money from his father's estate.

During the six months, Jane, not realizing that the note was no good because husband and wife cannot contact, endorsed it "without recourse" to a man who was unaware that the maker was her husband. When the note matured, Alden couldn't meet it; the estate was still in litigation but he was not liable upon it anyway for the note was void.

The holder then turned to Jane, and sued her on the ground that by endorsing it even "without recourse" that she had warranted.

1. That the instrument was genuine, (which it wasn't).

2. That she had good title, (which she didn't).

3. That prior parties had capacity to contract, (which they hadn't) and,

4. That she knew of no defect in the instrument, (which she did).

Jane paid the \$500 with interest and the costs of the suit.

More anon,

Benney v. Globe, 150 Mass. 574;

Jacobs v. Brown, 259 Mass. 232;

Lobdell v. Baker, 3 Metc. 469.

Have You Made Proper Presentment and Given Proper Notice?

Dear Mr. Allen,

You did a very ordinary thing when you called up the maker of the promissory note and asked him if he was prepared to pay the note on the day of its maturity, but unfortunately, although you did a thing which is very common you did not make a sufficient presentment and demand on the instrument to enable you to hold Mr. Barr as an endorser. He really is within his legal rights when after learning the facts he informs you that he is not responsible for payment.

The law says that in order to hold endorsers upon negotiable instruments, presentment and demand shall be made upon the party primarily liable upon the day of maturity. That means that it is necessary for the holder of an instrument to present it in person and at the time of the presentment and demand to have the instrument in his possession in order that if it is paid it may then and there be delivered up to the party who met the obligation. Such presentment and demand should be made at the address specified in the instrument or if no address is given, either at the place of residence or the place of business or in any event to the individual personally wherever he can be found. After having made proper presentment and demand, and having been denied payment upon the day of maturity or if such day is a legal holiday, or Sunday, on the next business day, it

then becomes necessary for the holder to give notice of what he has done to the endorser if he would hold him liable. He must give notice to endorsers who live in the same city as himself before the close of the day following the day of dishonor, but if the endorsers live in another city or town then the notice shall at least go on the day following the date of dishonor.

We have an interesting case in Massachusetts where the holder resided in Boston and the endorser lived in Somerville. The holder introduced in evidence the fact that he had mailed notice to the man in Somerville at 8:30 P.M. on the day after the notice was dishonored, but unfortunately for him he did not prove that there was any mail which left Boston for Somerville after 8:30 that night, and hence he had not lived up to the technical requirement of the law and he could not look to the endorser. All this material will be disappointing to you, I know, and I am sorry that you have lost your rights against Mr. Barr because I fear that the maker of that instrument will never be in a position to meet it. However, he will continue to be responsible upon the instrument and you can bring suit against him if you think it worth your while any time within six years from the date of maturity. If I can be of further help let me know.

Truly yours,

Harris v. Baker, 226 Mass. 113.

NEGOTIABLE INSTRUMENTS

A General Principles.

I Requirements to be negotiable:

1. It must be in writing, signed by the maker or drawer.
2. It must contain an unconditional promise or order to pay a sum certain in money.
3. It must be payable on demand or at a fixed future date.
4. It must be payable to the order of a specified person or to bearer.

II What constitutes an unconditional promise: S. 24, 25, 27.

1. The promise is unconditional although it is coupled with the indication of a particular fund from which the money is to be paid. It may contain a statement of the transaction which gives rise to the instrument, but a promise to pay out of a particular fund only makes the instrument conditional.
2. An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable, except that it may:
 - a. Authorize the sale of collateral security in case the instrument is not paid at maturity,
 - b. Waive the benefit of any law intended for the advantage of the person making the instrument,
 - c. Give the holder the election to require something to be done instead of the payment of money,
 - d. Be made payable by instalments, with a provision that upon default in any instalment, the whole shall become due,
 - e. Be made "with exchange,"
 - f. Be made with costs of collection.

III What constitutes payable at a determinable future time:

1. At a fixed period after date or sight,
2. On or before a fixed or determinable future time specified,
3. On or at a fixed future period after the occurrence of a specified event which is certain to happen although the time of happening is uncertain.

IV When is an instrument payable to order of a specified person: S. 30

1. When drawn to a specified person or his order,
2. When payable to the order of the maker himself,
3. When payable to the order of payee, or payees, or to joint payees,
4. Or to the order of a holder of an office.

V When an instrument is payable to bearer.

1. When so stated,
2. When payable to a person named therein or bearer,
3. When payable to the order of a fictitious or nonexisting person, when such fact is known to the person making it so payable,
4. When the name of the payee does not purport to be the name of any person,
5. When the only or last indorsement is an indorsement in blank.

B Negotiation

An instrument is negotiated when it is transferred from one party to another in such a way as to constitute the person receiving it the holder. If the instrument is payable to bearer, negotiation may be by delivery. If the instrument is payable to order, negotiation is by indorsement of the holder coupled with delivery. The indorsement must be written on the instrument itself, or upon a paper attached to it. It must be an indorsement of the entire instrument unless it has already been paid in part.

C Kinds of Indorsements. S. 56.

I Special A special indorsement specifies the person to whom or to whose order the instrument is to be payable.

II In blank. A blank indorsement does not specify any person to whom the indorsement is made and consequently makes the instrument payable to bearer.

III Restrictive. A restrictive indorsement is one which prohibits further negotiation and makes the indorsee the agent of the indorser. Such an indorsement gives the indorsee the right to:

1. Receive payment,
2. To bring any action which the indorser could bring,
3. To transfer his rights as a restrictive indorsee when the form of the indorsement allows it; e.g. "Pay to A for collection" Signed "X"

IV Qualified. A qualified indorsement makes the indorser a mere assignor of the title. Such an indorsement does not impair the negotiability of the instrument, but operates to relieve the indorser from certain liability; he is still liable on his warranties. Ex. "Pay to B without recourse."

V Conditional. A conditional indorsement passes the title subject to a specified condition. The maker or any party liable on the instrument may disregard the condition, but the person to whom it is negotiated will hold it subject to the rights of the person so indorsing. Ex. "Pay to B when he paints my house." Signed "A".

D Requisites of a Holder in Due Course. S. 75.

I A Holder in Due Course may hold any person to whom he can trace title, and such a holder takes the instrument under the following conditions:

1. It is complete and regular upon its face.
2. He became the holder before it was overdue and without notice that it had been previously dishonored.
3. He took it in good faith and for value.
4. At the time the instrument was negotiated to him, he had no notice of any defects in the instrument or in the title of the person negotiating it to him.

After maturity of the instrument, any person taking it takes it subject to defenses available against the holder from whom he derives title. Every holder is deemed prima facie a holder in due course, but when it is found that the title of someone negotiating it to him is defective, the burden is upon him to show that he is such a holder.

E The Contracts of the Parties.

I The maker of a promissory note:

1. Agrees to pay it according to its tenor.
2. Admits the existence of the payee and his capacity to indorse.

II The drawer of a bill of exchange or check:

1. Engages that the person upon whom it is drawn will accept it.
2. If it is dishonored and the necessary legal steps are taken he will pay the amount of the instrument to the holder or to any person who may be compelled to pay it.

III The acceptor of a bill of exchange:

1. Admits the existence of the drawer.
2. Admits the genuineness of his signature.
3. Admits his capacity and authority to draw the instrument.
4. Admits that the holder has the ordinary rights of a payee.

IV Every person who negotiates an instrument by delivery or qualified indorsement warrants that:

1. The instrument is genuine.
2. He has good title.
3. Prior parties had capacity to contract.
4. He has no knowledge of any fact which would impair the validity of the instrument.

Note that he who negotiates by delivery warrants only to his immediate transferee.

V In Addition, persons negotiating without qualification:

1. Warrant that the instrument is valid at the time of the indorsement.
2. Agree that if it is dishonored and the necessary legal steps taken, they will pay the amount of the instrument to the holder or any indorser who may be compelled to pay it.

F Presentment for Payment and Notice of Dishonor.

Presentment for payment is not necessary in order to charge the persons primarily liable, but it is necessary in order to charge drawers and indorsers.

I Presentment for payment is made at the proper place:

1. Where a place of payment is specified in the instrument and it is there presented;
2. Where no place of payment is specified, but the address of the person to make payment is given, and it is there presented;
3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence;
4. In any other case, if presented to the person to make payment wherever he can be found, or if presented at the last known place of business or residence.

If the instrument is payable at the bank, presentment must be made during banking hours unless there are no funds to meet it. In that case, presentment at any time before the bank is closed on that day is sufficient.

- II When an instrument has been dishonored, notice of dishonor must be given to persons secondarily liable, or they will be discharged. The notice may be given either personally or by agent, and when notice is given to one party by another party, all subsequent holders may take advantage of it, as may prior parties who have rights against the party to whom it is given.
1. If parties reside in the same place notice must be given:
 - (a) If at the place of business, before the close of business hours on the day following dishonor.
 - (b) If at the residence, before the usual hours of rest on the day following dishonor.
 - (c) If sent by mail, it must be deposited in the post office in time to reach its destination in the usual course on the day following dishonor.
 2. If parties reside in different places, notices must be given:
 - (a) If by mail, in time to go by mail the day following the day of dishonor, or if no mail goes that day, by the next mail thereafter.
 - (b) If given otherwise, then within the time notice would have been received if it had been deposited in the post office at the proper time.

G Discharge of a Negotiable Instrument.

- I By payment or cancellation;
- II By any other act which would discharge a simple contract to pay money;
- III When the debtor rightfully becomes the holder.

H Discharge of a Person Secondarily Liable.

- I By the discharge of the instrument;
- II By the cancellation of his signature by the holder;
- III By the discharge of a prior party;
- IV By a valid tender of payment made by a prior party;
- V By a release of the principal debtor unless the holder's right to recourse is reserved (generally by agreement);
- VI By agreement binding upon the holder to extend the time of payment by the principal debtor unless made with the assent of the indorser sought to be held.

When a person secondarily liable upon an instrument pays it, it may again be indorsed unless the person so paying is the drawer of a bill of exchange or an accommodated party.

A person may at any time renounce his rights against any other party to the instrument, but this affects him only, and no other holder in due course.

When a negotiable instrument is altered in a material particular without the assent of all parties, it is void except against those who have authorized or assented to the alteration and subsequent indorsers; but a holder in due course not a party to the alteration may enforce payment according to the original tenor.

I Checks,--bills of exchange drawn on a bank, payable on demand.

I Presentment for payment.

1. Must be made within a reasonable time after its issue, or the drawer will be discharged from liability to the extent of the loss caused by the delay.

II Certification.

1. When a check is certified by the bank on which it is drawn the certification is equivalent to acceptance.
2. When the holder has it certified, the drawer and all indorsers are discharged from liability.
3. When the drawer has the check certified his liability is that of the drawer of a bill, i.e., secondarily liable.

IV The Law of Sales. Note that 85% of the purchases are made by women. Let them give special heed.
1. Another summary to be skipped or perused.

Caveat Emptor

This maxim of law, "Let the buyer beware",
Means buyers must exercise caution and care
Defects, not perceived, give no ground for rescission
In the absence of warranty, fraud, or condition.

Latin Maxims
Foster

Title, Title, Who Has the Title?

Dear Arthur:

Do you remember when we were youngsters how we used to play "Button, button, who's got the button"? I thought of that game instantly after I had your letter telling of your problem. I am changing the wording a bit, - "Title, title whose got the title"? On the answer to that question depend your rights. Generally speaking the person who has the title has also the loss or gain and the fact that the article purchased has never been delivered makes no difference.

You negotiated for Allen's sheep in the fall, and he agreed to keep them through the winter for you. I see no reason why you didn't get title to those sheep last fall, regardless of the fact that you didn't know how many there were. You really bought the flock, for a given sum and had there been many or few you would have paid the set price. If I am correct in believing that the contract between you was for the purchase of a flock of sheep which Allen agreed to winter for you, then they were your property from the day of purchase; if they grew wool as they surely did the wool was yours and continued to be yours even after Allen sheared the sheep. Surely he must pay you for its value.

The answer depends on one question. Did you people last fall make a present sale or was the agreement that November day simply a contract to sell in the future?

35

Little, Little, Who Has the Little?

Dear Arthur:

Do you remember when we were youngsters how we

used to play "Little, Little, Who's Got the Little"? I

thought of that game instantly after I had your letter

telling of your problem. I am changing the wording a bit.

"Little, Little, Who's Got the Little?" On the answer to that question depend your rights. Generally speaking the person

who has the little has also the loss or gain and the fact

that the article purchased has never been delivered makes

no difference.

You negotiated for Allen's sheep in the fall, and

he agreed to keep them through the winter for you. I see

no reason why you didn't get little to those sheep last fall,

regardless of the fact that you didn't know how many there

were. You really bought the flock, for a given sum and had

there been many or few you would have paid the set price.

If I am correct in believing that the contract between you

was for the purchase of a flock of sheep which Allen agreed

to winter for you, then they were your property from the day

of purchase; if they grew wool as they surely did the wool

was yours and continued to be yours even after Allen sheared

the sheep. Surely he must pay you for its value.

The answer depends on one question. Did you

people last fall make a present sale or was the agreement

that November day simply a contract to sell in the future?

If it were the former the sheep were immediately yours, and if they all died during the winter you still would have been liable for the agreed price. I wonder if that had been the picture if Allen would have refused the money or for one moment thought himself not entitled to it. If you took the risk you also took the gain. On the other hand if that was an agreement to sell the flock in the spring then no title could pass to you at the time and with the title still in Allen the spring clip would have been his. Evidently he regards the transaction in this way but the Sales Act in Massachusetts has laid down certain rules to aid in finding the intention of the parties when the parties cannot agree and if there is an agreement to sell specific goods in a deliverable state title passes at once regardless of the time of payment or the time of delivery. The flock of sheep constituted specific goods; surely they were at the time in deliverable state and I see no reason why they did not then and there become your property and any wool which they grew was also yours. Talk your problem over with Allen again and don't make any final payment until the matter is adjusted.

Hastily yours,

Martin v. Adams, 104 Mass. 262;
M. K. Smith Corp. v. Ellis, 257 Mass. 269.

Was the Sale Over Five Hundred Dollars, and If So, What of It?

Dear Greta,

You always did have extravagant tastes and have frequently indulged them to the detriment of your pocket-book, but this time the law is on your side.

In the first place, I am surprised that you went to that particular individual, a man of no business standing, to purchase an Oriental Rug. I know that he has nice eyes, a soothing voice and a way of looking at one as if she were the only person in all the world. For heaven's sake, Greta, grow up! Really, Harry's financial success is a curse to you. Why do women who have so much and who could do so much have to be such fools. Oh, yes, I know you are thoroughly angry with me, but you have been before and you'll recover.

So the dear showed you a wonderful Oriental for \$750, told you that it was a grand bargain, that it had been in the palace of some old reprobate, and that it was just what was needed to give your home atmosphere. I know the line. And you fell for it. And it was to be delivered on Wednesday. You told Harry and he was so furious that somehow, though you were sorry for Adorable when you learned of the fire that destroyed his store on Tuesday with the rug still there, you did feel relieved. You felt relieved until Adorable, now less adorable, informs you that the rug was yours and that you owe him \$750 and that the loss is yours.

He is right, Greta, to a certain point. The rug was yours. Title passed on that Monday morning, and it is true that he who has the title takes the loss.

However, in Massachusetts if a sale involves more than \$500, unless the buyer has signed a paper, or paid down some money, the seller cannot enforce payment unless he can prove that the buyer has both accepted and received the goods. You accepted all right for you agreed to take the rug, but you never received it, for it never left the store.

Send Adorable to me and I'll treat him a bit roughly, and send the bill to you, not to Harry, and you are to pay the bill out of your money, not out of his. I suppose I should be glad that there are people like you these days. Business is rather quiet.

Until the next time,

Marvin v. Wallis, 6 E. & B. 726;
Atherton v. Newhall, 123 Mass. 141.

Did You Buy a Portion of a Larger Mass?

Dear Mr. Robbins,

You are not liable to the sheriff for conversion for you have exercised a dominion only over your own goods.

The general rule is that no title, by weight, measure or count, can pass to a portion of goods in a larger mass without physical separation but today we recognize an exception in case of fungible goods, goods in which every unit is like every other unit, e.g. grains, liquids, hay.

When you bought the two hundred bushels of corn in Sterns' corn crib, you immediately got title even though there were five hundred bushels in all. Therefore, when the sheriff attached that corn for a creditor of Sterns, he could not attach more than three hundred bushels. And when Sterns seized two hundred bushels, he was merely bringing to you that which was your own. The sheriff has no rights whatsoever.

Truly yours,

General Laws (Ter. Ed.) Ch. 106, s.8 (2).

When the Seller Promises Personal Satisfaction

Dear Ada,

If the man from New Bedford promised you that you should be personally satisfied with the chair he would send out, you are quite right in thinking that you are entitled to personal satisfaction. Stick by your guns. Demand that he take the chair back and refuse to take others if they are not what you want.

In the first place, you are dealing with a rather poor outfit and I am surprised that they would ever promise personal satisfaction. They probably will deny it, but Evan is pretty clean cut in his thinking, and he seems confident that the statement was given. It is a wise proposition to insist upon because if a seller does guaranty to satisfy the purchaser, the courts will enforce the contract as made.

You can be as unreasonable as you like, Ada, as long as you are honest, and I know you are both that and reasonable, but don't keep the chair. If you did, you could be forced to pay the full price.

Devotedly yours,

Farmer v. Golde, 225 Mass. 260;
Weinstein v. Miller, 249 Mass. 516;
Brown v. Foster, 113 Mass. 136.

The Day of Caveat Emptor

Dear Mrs. Fuller,

Don't you know that the public likes to be "humbugged"? It is not a new attitude. Do you remember how in the Vicar of Wakefield, Moses went to the fair to sell the family cow that they might get money for food? He returned with a gross of green spectacles with "solid gold rims" according to the words of the seller, but en route the solid gold had turned to worthless brass.

The public still bites and we still preach the doctrine of let the buyer beware, the doctrine of caveat emptor.

"Balzaa's books are nice books for children to read," and the tired mother purchases and learns she has no come back.

"This cleaner is clean, economical, efficient, perfect in the smallest detail," and the buyer discovers that once again he is a victim.

"This is a gilt-edge security," and the victim is out of pocket.

So Louville bought a coat and was told "that it would wear like iron," and instead it is proving a poor buy. He really has no come back legally; he should have known that those words were but words of puffing--dealer's talk. We all like to hear them, we like to kid ourselves along, and if a seller failed to use them, we would feel that he didn't believe sufficiently in his wares. I suppose, after all,

salesmen and advertising men give us what we want, and we can hardly complain. However, I fight shy of advertisements that stress "pink tooth brush," "B.O.," etc., they are a bit too ghastly for me.

What Louville can't accomplish by legal means he probably can accomplish through the force of personality.

Tell him to go to it!

Sincerely,

**Lalime and Partridge v. Hobbs, 255 Mass. 189;
Pike v. Fay, 101 Mass. 137.**

All about Food.

Dear Margaret,

You are always interested in cases which come into the office and I know you will be interested in my afternoon. It is years since I have seen Mary Frost but I knew that she worked in a dentist's office in the Back Bay. She is not very different from what she was back in college days, rather peppery and impulsive, fond of the good things of life and easily disturbed.

Last Friday when she went out to lunch she went to a new place up on Boylston Street and she said it was hot and she thought she'd have a cool, refreshing salad. She got a most appetizing dish and was enjoying it tremendously when a young woman at the next table gave a little scream, and there, dangling on her fork which was just on the point of entering her mouth, was a fat green worm just the color of the lettuce leaf. You can imagine how furious she was and I suppose her chagrin was increased because of being seen in the process of worm eating.

Naturally they were most apologetic, but she left in high dudgeon, went back to the office, and, as you would expect, was so completely prostrated that she spent the afternoon on the couch in the rest room. Today she would like to collect enough from "Ye Brass Kettle" to finance her summer vacation. I told her that it was too bad she hadn't eaten at least a piece of the worm, and I judge that

now I am about as popular as the eating place.

Years ago the law thought of inns, and restaurants and hotels as places of entertainment. If you ordered a steak for dinner it didn't become your property, but you were privileged to enjoy it, and so consume it, but if you had decided to eat a part and take away the rest you could have been stopped just as thoroughly as if you had attempted to carry off the silver. Today apparently the law has changed and I see no reason why one couldn't fold up in his pocket handkerchief the remains of the feast and save it for the morrow. However a few months ago I saw a waitress remonstrate with a young woman who started to take a doughnut with her. I wanted to tell her that I believed she was within her rights for somehow I felt that it was a depression measure.

Not only do you get title today to food which you purchase in restaurants, cafeterias, etc., but the dealer promises the consumer that it shall be fit for human consumption and if it is not and causes expense to the victim he can recover as long as he can prove that it was not fit and that it was the thing which damaged him. A dealer is liable in a contract action although there was no conceivable knowledge or negligence on his side for that is one of the burdens he takes with the privilege of selling. He can also be sued successfully in what we call a tort action if the victim can establish negligence. People prefer to sue

in tort wherever possible for the money damages awarded are liable to be greater but if one believes that it would be difficult to prove carelessness then he better stick to the contract action.

In a case against the Childs Dining Hall a woman broke off a tooth by biting on a small pebble in baked beans, thinking at the time it was but an overdone bean. She sued in contract and recovered. I doubt if she would have been successful had she sued in tort, for it would have been most difficult to establish negligence.

Then there was another case against the Child's Restaurant in which a woman was injured because of a tack in blueberry pie. She sued for negligence but was not able to establish any and lost her case, but had she sued in contract she doubtless would have recovered if she was the one who ordered the pie and therefore one of the contracting parties.

There has been, a recent case that I have watched with interest against the Liggett stores. A woman ordered strawberry shortcake and had her mouth cut by glass. The action was brought for negligence. I was sure the case would be lost for I didn't see how Liggett people who buy the cake and the strawberries and the cream from outside concerns could be found negligent. However, the evidence brought out the fact that the concoction was assembled in the basement by a sink into which broken Moxie glasses had been thrown and that the glass in the cream was of the same

variety, and just this spring the woman got a very substantial judgment.

Mary Frost certainly was not served food fit for human consumption. I really think that negligence could be found to exist when a salad is permitted to come to the table with a nice fat active worm, but her sickness and discomfort did not come from any contact with the worm but from her own fright. Unfortunately the law doesn't value mental suffering caused negligently, as damage. You see she really should have eaten the worm!

Continued in our next, may be,

With love,

**Friend v. Childs Dining Hall Co., 231 Mass. 65;
O'Brien v. Liggett Co., 255 Mass. 553;
Gearing v. Berkson, 233 Mass. 257.**

"Furnish the Love Nest at a Dollar Down and a Dollar a Week"

Dear Grace,

Do I think you and Jimmie should get married or wait until the depression period lifts? Well, youngster, I am a bit of a pessimist at times and I wonder if the depression ever will lift and if you wait for that if you may not be old and feeble and gray.

You are young, ambitious, strong, and well. I know Jim's salary is small, but I think I'd risk marriage next fall if you both very much desire it and perhaps it will seem wise for you to work for a time longer in order that you may get a start.

What do I think of buying furniture on the instalment plan? I don't think much of it, Grace, more than I think people should buy cars on the instalment plan, or radio, or fur coats or hundreds of other things. Personally, I believe that people should budget for things, save systematically for them and not have them until they can pay for them. But I know I am very old fashioned in this belief.

There are plenty of people who stress the glories of the system, it teaches you thrift. Personally, I think it teaches extravagance. It enables you to maintain a standing in society. A society which is maintained because of material things has little of real value. The system brings you comfort and happiness. No more comfort and happiness than a deferred purchase and with my plan there is much less

worry.

There are several months before fall. Both you and Jim have saved some money. Talk over what you'll really need. Forecast what you can save between now and then. Watch the sales. You can buy now and the stores will hold for future delivery.

If my suggestions seem too humdrum, then go into the conditional sales contracts with your eyes open. First, make up your mind you'll pay more for inferior goods. Remember that if you fail to meet any instalment the concern may take your furniture and furnishings after thirty days and all money that you have paid in will be lost, and the contract will probably provide that the unpaid balance will still be due the company. There are many pitfalls for the unwary, and don't get in too far.

Sincerely yours,

Sallinger v. Collateral Loan Co., 215 Mass. 266;
 Angier v. Mfg. Co., 1 Gray 421;
 Bousquet v. Mack Truck Co., 269 Mass. 20;
 Porter v. Stuart, 203 Mass. 46;
 General Laws, (Ter. Ed.) Ch. 255, s. 12, 13.

UNIFORM SALES ACT

A sale of goods is an agreement whereby the seller transfers the title to goods to the buyer for a consideration called the price. An agreement to sell is distinguished from a sale in that a sale represents an actual transfer of title, while an agreement to sell is merely a contract to make such a transfer in the future.

A Elements

- I An agreement, - a sale is a contract and must have all the elements of a contract.
 - 1. One exception, - a sale by operation of law.
- II A transfer of title, - as a general rule he who has the title has the risk.
- III Goods, - personal property, either tangible or intangible.
- IV Price, - today, money or money's worth. It may be fixed by the terms of the contract or be left to be fixed later. Today a barter is a sale.

B. Transactions Somewhat Similar in Nature

- I Bailment, - a transfer of goods to another; identical goods to be returned in the same or altered form. The title remains in the bailor, but possession is in the bailee.
- II Conditional sales agreement, - installment leases.
 - 1. Under the terms of the contract of sale the title is to remain in the vendor until the full purchase price has been paid.
 - 2. Inasmuch as title is kept for one purpose, namely to get the price, the risk is upon the vendee.
 - 3. The possession is in the vendee and upon performing the condition he will gain title, but upon breach of the condition the vendor is entitled to possession, and may recover the specific goods from the vendee or his assigns, or may sue either in conversion for the value, after a demand and refusal.
 - 4. Until breach of condition the vendee may sell such interest as he possesses, or it may be attached by his creditors.
 - 5. A conditional vendee from whom goods have been taken has fifteen days in which to redeem upon payment of the installment due and costs.

C Statute of Frauds.

- I Applies to contracts involving goods or choses in action to the value of \$500.00 or over in Massachusetts.
- II Contract will be unenforceable unless the statute is satisfied in any one of three ways:
 - 1. Acceptance and receipt
 - a. Acceptance is mental, - expressing satisfaction with the goods.
 - b. Receipt is physical, either the actual physical possession by the buyer or delivery to a common carrier for transmission to the buyer satisfies the requirement.

2. Earnest or part payment

- a. Formerly "earnest" meant something in addition to bind the bargain; today it has no distinctive meaning.
- b. It may be money or money's worth, or even the extinguishment of an old debt, but it is not forfeit money.

3. The memorandum.

- a. The memorandum must state the promises of the defendant and be signed by him or his agent, or it must incorporate other documents in which the essential terms may be found.
- b. The buyer and seller must be identified in the memorandum element in this state.
- c. The memorandum may be made any time before suit.

D Conditions and Warranties. S 13-18.

1 Warranties.

1. A warranty is an affirmation of a fact or a promise of a future event.
 - a. No form of words is necessary; it is not necessary even that the vendor shall intend to warrant for it is enough if the buyer is led to purchase because of his statement.
 - b. A warranty must be more than a mere expression of opinion or "dealer's talk".

2. In a sale by inspection.

- a. An express warranty does not ordinarily cover patent defects for the doctrine of "caveat emptor" applies but the seller may, by express statement, however, protect the buyer even against such patent defects if the buyer prefers to rely upon the warranty rather than on his own judgment.
- b. There is one implied warranty in a sale by inspection namely, if the seller is a manufacturer, grower, or producer that the goods shall be free from latent defects, not apparent upon reasonable examination.

3. In a sale by description.

- a. Two implied warranties:
 - (1) Goods must answer the description, and
 - (2) Be merchantable.

4. In a sale by sample.

- a. Three implied warranties:
 - (1) Goods shall correspond to the sample in bulk;
 - (2) The buyer shall have the opportunity to compare the goods with the sample unless they are sent C. O. D.
 - (3) Goods shall be merchantable and free from defects not apparent on reasonable examination of the sample where the seller is a dealer in goods of that kind.

5. Implied warranty of fitness.

- a. Today if food is purchased by a consumer from a dealer there is an implied warranty that it shall

be fit for human consumption if the consumer relied upon the dealer for selection.

(1) This rule does not apply to "trade marked" goods.

b. At other times there is no such implied warranty unless:

(1) The buyer makes known the particular purpose for which he wishes the goods and relies upon the seller's skill and judgment, or

(2) Unless such warranty has been annexed by usage or trade.

E Valid, Voidable or Void Titles. S. 25-29

I The buyer secures, generally, no better title than the seller had, to sell.

1. Under the Sales Act retention by the seller of the goods, is fraudulent and he who first gets possession, be he an innocent purchaser for value or an attaching creditor, is entitled to the goods.

II If the seller's title is voidable, but has not been avoided, an innocent purchaser for value may acquire a valid title.

III From a thief one gets no title.

F Rights of The Parties.

I The unpaid vendor's lien.

1. In the following cases he may retain possession until payment, or tender of payment of the price.

a. When goods are sold without stipulation as to credit; (Cash sales)

b. When goods have been sold on credit but the term of credit has expired;

c. When the buyer becomes insolvent.

2. The unpaid seller loses his lien,

a. When he delivers the goods to a carrier for the purpose of transmission to the buyer, unless he reserves the right to possession;

b. When the buyer or his agent lawfully obtains possession;

c. When he waives his right to the lien by allowing the buyer to come upon the premises and work upon the goods.

II The right of stoppage in transit.

1. There must be an unpaid seller who has parted with title and possession. The goods must be in transit and the buyer insolvent.

2. Goods are in transit from the time they are delivered to the carrier until under the control of the buyer.

3. If the carrier has not actually or constructively delivered the goods to the buyer, it must upon notice redeliver the goods to the seller.

III The seller in event of breach by the buyer may:

1. Resell the goods under certain circumstances and recover the loss from the buyer.

2. Sue for the price.

3. Sue for damages for nonacceptance. s. 53.
4. Rescind the contract upon notification of his election to do so.

IV The buyer in event of breach by the seller may:

1. Maintain an action for conversion of the goods if the title has passed, and the seller wrongfully refuses to deliver. s. 55.
2. Sue for damages for nondelivery. s. 56.
3. Seek specific performance of the contract, if damages for nondelivery do not afford an adequate remedy.
4. Rescind the contract.

V Where there has been a breach of warranty on the part of the seller, the buyer may:

1. Keep the goods and set up the breach of warranty by way of recoupment in diminution of the price.
2. Keep the goods and sue for damages occasioned by the breach of warranty.
 - a. The damages will ordinarily be the difference between the value of the goods received and the value the goods would have had, had they been as warranted.
3. Refuse to accept the goods, if title has not passed, and sue for the damages.
4. Rescind the sale by refusing to accept, or by returning, or offering to return the goods and recover any amount paid.

D Letters to those who would acquire Property, real and personal.

I Real property, - the soil of the earth and everything attached thereto in a permanent and substantial manner.

II Additional points in skeleton form.

"Property has its duties as well as its rights."

Letter to the Landlords of
Tipperary, May 22, 1838

by Thomas Drummond

He that holdeth his lands in fee,
Need neither to shake nor to shiver.
I humbly conceive, for, look, do you see
They are his and his heirs forever.

Lord Hardwicke

About Trees and Fruit.

Dear Ada:

It is one of those rarely perfect days when the sky is so blue and the air marvellously clear; the sun is warm but a cool breeze keeps one ambitious. We left the beach about seven thirty o'clock this morning, and with mother, Mrs. Holmes and Frances, started on the King's Highway to Provincetown. We reached Wellfleet about eleven o'clock and Mrs. Holmes went calling on friends of other days while the rest of us enjoyed the hospitality of a delightful Cape Cod yard. At present, by permission, Frances is busy digging up small spruces which we hope to plant at our cottage. I am reminded of your disgust the day you found the automobile stopped by your field and its occupants engaged in helping themselves to fruit which overhung the highway. There seems to be a tremendous misunderstanding in reference to apples, cherries and grapes that are overhanging travelled roads. I recall how belligerent the people were that day when you suggested that you would enjoy picking your own fruit. You were right, and they were wholly wrong; but to a disinterested listener the odds would have seemed to have been quite the other way.

Fruit which overhangs either the highway or the land of another really belongs to the person on whose land the tree, bushes, or vines grow, and he alone has a right to it. If, through the force of gravity, the fruit falls to

the earth its owner may go for it without being a trespasser; but on the other hand should he shake the tree so that the apples fall in his neighbor's yard he cannot later remove them without permission.

The principle which governs fruit overhanging the highway is the same. Automobilists and pedestrians are not entitled to it but this bit of law has never been digested by the American populace.

There is another interesting angle concerning trees near boundary lines, trees whose branches overhang the neighbor's land. Such branches are trespasses and nuisances, and can be removed by the owner of the adjacent land. However, he has no right to the wood; it still belongs to the man on whose land the tree stands.

Do you recall the fine old maple in Mrs. Cushman's yard? They were planted by Mr. and Mrs. Cushman shortly after their marriage, and in the fifty years that had intervened had gained a glorious growth. Mr. Cushman was tremendously proud of them while he lived, and Mrs. Cushman loved them tenderly. The adjoining property was sold and the new owner reminded Mrs. Cushman that the branches badly shaded his buildings and asked permission to trim them up. She felt so disturbed that she went away the morning it was done and, poor lady, she wanted to die the afternoon she returned. The trimming person had done a thorough job, and all the beauty was gone - it was as if a sharp knife had cut the

greater portion of one side. At the time I thought the trees would die; but they are still alive and I often feel as I pass them by that they are pitifully trying to heal the bruise and cover their nakedness. He was wholly within his legal rights; but surely he lacked imagination and appreciation of beauty - for "only God can make a tree".

I have been asked if overhanging branches can be removed after a period of twenty years, the time required to gain an easement by prescription, i. e., a right which cannot be interrupted? The length of time makes no difference with trees, for the character of their limbs is constantly changing but if the eaves of my house overhung your land for twenty years you could not touch them.

Frances has taken up four little spruces and because of the permission we are not trespassers. Now we'll dump them, ants and all into the trunk, and tomorrow morning they will become a part of our real estate. We shall lay no claim to the ants because as wild animals they belong to no one until reduced to possession, and we certainly have no desire to domesticate them.

Love,

Hoffman v. Armstrong, 48 N.Y. 201;
Com. v. Blaisdell, 107 Mass. 234;
Bliss v. Ball, 99 Mass. 598.

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Love,

Hollman v. Armstrong, 45 N.Y. 201;
Com. v. Hissdale, 137 Mass. 234;
Bliss v. Hall, 62 Mass. 355.

Rights upon the Beach

Dear Mortimor,

I am sorry about Junior's boat, and I do believe that you will find someone on the water front who will be more gracious than legal and who will permit you an opportunity to tie the boat up. You ask me if they can prevent you anchoring your boat. I imagine, yes--but that depends on the way their deeds read. They tell you that their deeds give them ownership even under the water and that is quite possible. Today by statute ownership may go out to low water mark or a distance not greater than one-hundred rods from mesne high water mark. In that case the public, of which you are a part, have a right "to fish, to fowl and to navigate" at high tide. People often wonder what meaning is attached to the last two expressions. "Fowling" refers to duck shooting, and "navigating" to rowing or swimming, but note there is no right of bathing. If your friends on the beach wanted to be particularly technical they could stop you, not only from anchoring your boat, but also from bathing at high tide, unless their lots were sold subject to that privilege for all North Shore colonists.

Over here the beach is owned by the community; therefore, the problem does not arise. The community specifies the places where boats may be anchored and the places where the bathing beaches must be kept clear. Why not sell on the North Shore and buy over here at the Heights? That

is a real solution to your problem. We'd love to have you and Margaret and Hope and Junior for neighbors. Of course, the inconvenience of selling in these days is a mere detail.

Regretfully yours,

Boston v. Richardson, 105 Mass. 371;
 Waters v. Lilley, 4 Pick. 145;
 Com. v. Chapin, 5 Pick. 199;
 Butler v. Attorney-General, 195 Mass. 79.

When Mine Becomes Yours.

Dear Margaret,

I do remember your telling me of the old table and secretary left by your mother in your grandmother's home, but your letter makes me afraid that it will continue to remain there. I'm sorry!

Of course your uncle knew all the while that those pieces belonged to your mother. Had he lived you could probably have gotten them, but apparently your letter to his widow was not too pleasantly received. In fact after all these years he probably looked upon them as his own and since his death seven years ago she has certainly treated them as her property and you people have permitted her to do so.

The law in reference to chattels is that a title by adverse possession is obtained when chattels are held openly, notoriously, adversely for a period of six years. So the law strengthens her position.

I recall one highly amusing case. A stole B's horse, held him for more than six years when B stole him back again. Then A sued B for the horse and won. Through holding the horse for six years and claiming title he had gained an ownership that could not be questioned even by the original owner.

You, I know, are familiar with the principle that if I occupy your land openly, notoriously, claiming it to be my land continuously for a period of twenty years that I gain a title and right to possession which you cannot dispute. The same thing is true in reference to personal property but the

time instead of being twenty years in six.

It is a shame, Margaret. You should have those old heirlooms and in turn they should go to Hope, but the law seems to be on her side. If she won't, she won't; that's all.

If I were you I'd go to see her, talk things over frankly, try the effect of friendliness. I find that that approach often helps tremendously.

Devotedly,

Percival v. Chase, 182 Mass. 371.

Property Owned by Husbands and Wives.

Dear Mother,

I laughed over your letter! So you would really like to see me long enough to enable you to consult with your family lawyer! What do I think father ought to do about the home place? I have an idea that he will do about whatever you'd like to have him do. You are asking me if I would advise his deeding the property so you both would hold it as tenants by the entirety.

Do you realize that you are paying me a real compliment when you ask my opinion on that score because if I advise it and see it put through I am cutting myself off from my statutory right, namely my right as an only child to two-thirds of his property if he passes away without a will, and he certainly will never make a will. I wouldn't even suggest it to him for if I should he'd get the idea that I either desired or expected his immediate demise. However, old dear, don't worry, whatever there is I should want to be yours. I shall do no complaining until I see a second marriage in the offing. Seriously, I think that a husband and wife are very wise to hold their property as tenants by the entirety.

People may hold real property as tenants in common, but there is no special advantage to such holding. In the case of the death of either administration is necessary, and the share of the deceased person passes to his heirs, but if they hold as joint tenants, the right of survivorship is stressed.

By that I mean that if A and B hold as joint tenants and A dies, his share at once passes to B. This method does away with the need of taking out administration to settle up the deceased's estate.

The same words which will make other people joint tenants will make a husband and wife tenants by the entirety, and such a holding differs from a joint tenancy only in the fact that neither one may sell his interest unless the other agrees; whereas if A and B are joint tenants, A or B can sell and thus destroy the joint tenancy. The purchaser becomes a tenant in common with the remaining joint tenant.

In a tenancy by the entirety, which by the way is possible only to a husband and wife, I have always felt that a wife was better protected. You take, for example, a man is in business, if there were law suits, and his property were attached, often unjustly, creditors could not prevent the property held by the entirety from passing to her upon his death, even though they might during his life control it. Of course the best thing of all is for a married man to have the home in his wife's name. Then it cannot be reached at all, but if he objects to that, and many men do, the other method is the next best thing.

The tenancy by the entirety is not as popular as it was a few years ago because recent decisions have determined that during the period of their lives all benefits are his. Apparently he can lease and collect the rents and profits, she cannot. It is attachable for his debts during his lifetime,

but not for hers, but on the other hand it does away with the need of administration and if he predeceases her it is hers absolutely, likewise his if she predeceases him. If a man holds his real property with his wife either as joint tenants, for they can hold jointly too, or as tenants by the entirety, and his personal property is held either jointly or by the entirety, all need of expensive and long drawn out administration is eliminated and it really works out advantageously.

When F and I first bought the cottage we had the deed drawn to us as tenants in common, but later when we came to feel that when one of us died we wanted the other to have the place wholly we changed the deed to a joint deed. To accomplish that we had to deed as co-tenants to another; we call him a straw-man, and then he deeded to us to hold jointly and that is the way the cottage stands today. It will go to the survivor if before that time we do not dispose of it.

For father to change over the deed of the home place it will be necessary for him to deed to some one. I'll do for a straw-man, and then in turn I'll deed to you both as tenants by the entirety. A person who owns land may since 1918 deed to himself and another jointly but he cannot deed to himself and his wife as tenants by the entirety except he acts through a straw-man.

One old couple came into the office one day. They were buying a piece of property and finally decided to have the deed drawn in this fashion. With much hesitation she asked what would happen if they got a divorce. I didn't even express

surprise at the possibility but assured her that thereafter they would hold as tenants in common. They went away satisfied and I don't know whether they are still tenants by the entirety or not.

I'll prepare the necessary deeds, if you people say the word. This may not be as satisfactory as talking the problem over, but I hope I have answered your questions.

Lovingly yours,

Raptes v. Pappas, 259 Mass. 37;
Voigt v. Voigt, 252 Mass. 582;
Ames v. Chandler, 265 Mass. 428.

Conditional Conveyances, Good or No Good

Dear John,

I have read carefully the deed which your uncle gave you on his last trip to Boston, covering the old home place down on the Wescasset shore. I understand now why you wouldn't stop to talk and why you seemed so troubled.

John, you are perfectly safe in considering the old place yours for all time. He has attempted to do something that the law will not permit, and I think you are under no obligation to tell him that he has been illy advised. You are the one to whom the place should go, the only one in the family that cares anything for it and with all his peculiarities and warped ideas, I ever thought he would leave it to you in his will. However, now that he is going to California for the rest of his days, I can see that he wants to place it in hands that will keep it up. He told you he'd sell it to you for \$100, and when he got the \$100, you got the deed but failed to read it over at the time.

Was it because he knew that you wanted to marry that he inserted the provision that he was deeding to you in fee on condition that you never married? I wonder what girl jilted him and why he wants to make you a recluse. The law considers such a condition void and you take the land free and clear of the condition. You may marry when you like and keep your property.

Had he deeded it to you "as long as you remained unmarried", then the law would have upheld it on the ground that

he did not object to marriage but that he was seeking to provide you with a shelter until another one, your wife's, was available. We say that one can do by words of limitation what he cannot do by words of condition.

Had you been once married, John, then the terms of his deed would be enforced for the law feels that one marriage is sufficient, but as far as you are concerned the condition is null and void.

Is it practicing trickery on the old man not to tell him? I don't think so. He gave you a deed of his own making. That it will not have the effect he desired is no fault of yours, and the day may come when your children may be such a comfort to him that he will be very glad that he failed to accomplish what, at a given moment, he thought desirable.

Sincerely,

**Ruggles v. Jewett, 213 Mass. 167;
Randall v. Marble, 69 Maine 310.**

SUMMARY OF THE LAW OF PROPERTY

A Introduction

I Property is either real or personal.

1. Real property includes lands, tenements and hereditaments, the last two terms, now synonymous.
2. Personal property includes all goods, chattels--movables.

II The term "land".

1. Trees belong to the individual on whose land they stand and such person is entitled to fruit of overhanging branches.
 - a. Such overhanging branches are a nuisance and may be cut off by the person whose land is invaded.
 - b. No easement by prescription can be gained.
 - c. The right of the owner to go on the other's land to take wood or fruit depends on whether he is to blame for its presence there.
2. Growing trees are land, and trees which have fallen and nothing further has been done with them pass under a deed thereof.
 - a. In a sale of standing timber the doctrine of constructive severance applies in this state.
 - (1) Oral agreement to convey is good; no title passes except upon severance.
3. Title to ice is in the owner of the soil on or over which the water rests, or runs.
 - a. If title is in the public, as in great ponds--bodies of water of more than 20 acres, or in navigable rivers--where the tide ebbs and flows, then the public has title to the ice formed thereon, and it belongs to the first appropriator.
 - b. Ice formed on a non-navigable stream belongs to the riparian owners.
 - (1) For the purposes of sale ice is regarded as personal property and so is not within the fourth section of the Statute of Frauds.
4. Natural crops--products of the earth which are permanent in their nature and do not depend primarily for their growth upon the care and labor of man.
 - a. They follow the land to the heir or the devisee.
 - b. For the purposes of sale are considered as personal property and the sale may be oral.
5. Emblements--products of the earth which are raised annually, and depend on the care and labor of man.
 - a. Emblements are personal property, but as between a grantor and grantee of land they will pass under the deed to the grantee in the absence of reservation.

B The Law of fixtures.

The chief test to determine whether fixtures are real fixtures or

1. Introduction

1.1. Property is either real or personal

1. Real property includes land, buildings and fixtures.
2. Personal property includes all other movable property.

1.2. The term "land"

1. Land refers to the land itself, any buildings and any other things which are attached to the land in a permanent manner.
2. Land includes any rights in the land, such as a lease or a mortgage.
3. Land includes any rights in the land, such as a lease or a mortgage.
4. Land includes any rights in the land, such as a lease or a mortgage.
5. Land includes any rights in the land, such as a lease or a mortgage.
6. Land includes any rights in the land, such as a lease or a mortgage.
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8. Land includes any rights in the land, such as a lease or a mortgage.
9. Land includes any rights in the land, such as a lease or a mortgage.
10. Land includes any rights in the land, such as a lease or a mortgage.

1.3. Land is divided into two parts: the land itself and the rights in the land

1. The land itself is the land itself, including any buildings and any other things which are attached to the land in a permanent manner.
2. The rights in the land are the rights in the land, such as a lease or a mortgage.

1.4. The rights in the land are divided into two parts: the rights in the land itself and the rights in the rights in the land

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1.5. The rights in the rights in the land are divided into two parts: the rights in the rights in the land itself and the rights in the rights in the rights in the land

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2. The rights in the rights in the rights in the land are the rights in the rights in the rights in the land, such as a lease or a mortgage.

2. The Law of Property

The Law of Property is the law which governs the rights in property.

personal fixtures is the intention of the party making the annexation. Three classes of evidence are introduced to prove this intention.

I Character of the annexation. Weakest evidence.

1. If the chattel is so affixed to the land as to lose its identity, or cannot be removed without material injury to the land or to itself it has become a part of the realty.

II Adaptability of the fixture to the realty.

1. The tendency is to regard every fixture as real property which has been attached to the realty with a view to the purpose for which the realty is held or employed, except as between landlord and tenant.

III Relation of the parties, the most important of all.

1. Between the tenant for life and the remainderman or reversioner.

- a. The life tenant is favored hence the chattels which he annexed would belong to his personal representatives, G.L. c. 184, s. 12.

2. Between the landlord and tenant.

- a. The tenant is favored.

- (1) The chattel may be removed before his tenancy expires, or before he has quit possession but he loses the right to remove fixtures annexed during his term if he renews his lease and remains continuously in possession unless the new agreement, lease or renewal expressly permits the right.

- (2) If the landlord prevents the removal he is liable to the tenant for damages, or the tenant may remove the fixtures after the term has expired if he can do so peaceably.

- (3) A purchaser of the property is chargeable with the rights of a tenant in possession.

3. Between a mortgagor and mortgagee of land.

- a. "Whatever is placed in a building subject to a mortgage by a mortgagor or those claiming under him, to carry out the purposes for which it was erected, and permanently to increase its value for occupation or use, although it may be removed without injury to itself or the building, becomes a part of the realty." The mortgage is favored.

4. Between mortgagee of land and mortgagee of chattels.

- a. In Massachusetts the real property mortgage covers fixtures placed on the land either before or after the mortgage was made, and therefore the real property mortgagee has preference over the chattel mortgagee unless he agreed to the chattel mortgage.

C Estates in fee Simple.

Real property can include only freehold estates.

I Freeholds at common law

1. The fee simple--an estate of inheritance.
2. The fee tail--an estate of inheritance.

General statement is the intention of the party making the statement.
These classes of statements are distinguished as follows:
1. Statement of the speaker. - When a person makes a statement, it is intended to be believed as true by the hearer.
2. Statement of the hearer. - When a person makes a statement, it is intended to be believed as true by the speaker.

3. Statement of the speaker to the hearer. - When a person makes a statement, it is intended to be believed as true by the hearer.
4. Statement of the hearer to the speaker. - When a person makes a statement, it is intended to be believed as true by the speaker.

5. Statement of the speaker to the speaker. - When a person makes a statement, it is intended to be believed as true by the speaker.
6. Statement of the hearer to the hearer. - When a person makes a statement, it is intended to be believed as true by the hearer.

7. Statement of the speaker to the hearer to the speaker. - When a person makes a statement, it is intended to be believed as true by the speaker.
8. Statement of the hearer to the speaker to the hearer. - When a person makes a statement, it is intended to be believed as true by the hearer.

9. Statement of the speaker to the speaker to the speaker. - When a person makes a statement, it is intended to be believed as true by the speaker.
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13. Statement of the speaker to the speaker to the speaker to the speaker. - When a person makes a statement, it is intended to be believed as true by the speaker.
14. Statement of the hearer to the hearer to the hearer to the hearer. - When a person makes a statement, it is intended to be believed as true by the hearer.

3. The estate for life--not an estate of inheritance at common law, but by statute an estate for autre vie is made an estate of inheritance.
4. By statute, leases for one hundred years or more are freehold estates of inheritance so long as fifty years thereof remain unexpired.

D The fee simple. A freehold in perpetuity, descending to all heirs of the owner, both collateral and lineal.

I Facts concerning:

1. Prior to 1912 the conveyance had to be to the grantee and his "heirs". No other word was equivalent.
2. No living man has heirs; hence the presence of the word "heirs" grants nothing to the heirs. It is a word of limitation and not of purchase.
3. The word "heirs" could be incorporated by reference at common law.

E The fee on condition. An estate with a qualification annexed by which the estate may, on the happening of particular event, be created, enlarged, or destroyed.

I Condition precedent vs. the condition subsequent.

1. The court favors the condition subsequent.
2. Apt words--"if," "provided," "on condition,"--are necessary in a deed to create a fee on condition. If not present, the particular clause will be interpreted to be a covenant rather than a condition because a breach of a condition may result in a forfeiture. Not true in a will.
3. If the condition precedent is void, or for any reason impossible of performance, no estate can vest.
4. If a condition subsequent is void or impossible of performance through no fault of the grantee, the title vests in him free of the condition.
5. If no time is fixed to the condition, by statute of July 16, 1887, the property will be freed from the condition at the expiration of thirty years, except in cases of gifts, or devises, for public, charitable or religious purposes.
6. Any condition which is a general restraint on alienation is void.
7. Conditions in either general or partial restraint of marriage contained in gift of personal property are void, but in transfers of real property a condition in partial restraint, not general, is valid as far as first marriages are concerned, if reasonable. Conditions in total restraint of first marriages are void but good when applied to second marriages.
 - a. A restraint on marriage which is void if expressed in the form of a condition is valid if done by means of a limitation.
8. In case of a breach of condition subsequent either the grantor or his heirs may enter and defeat the estate, but until such entry the estate is not defeated.
9. Whenever an estate is granted upon condition subsequent

there remains with the grantor a possibility of reverter.

a. Such possibility of reverter may be willed but not deeded.

- (1) If the grantor attempts to deed his possibility of reverter he conveys nothing, but also destroys the possibility of reverter and give the holder of the defeasible fee, a fee simple absolute.

F Estates for life. A freehold interest held by the tenant for the term of his own life or for that of another person, the latter is called a tenant per autre vie.

I Life estates are conventional or legal.

1. Conventional life estates, those created by acts of the parties, whether by deed or will.
2. Legal life estates, created by operation of law, without any act of the parties--curtesy, dower.

II Facts concerning:

1. Life estates may be freely conveyed, sold, leased or mortgaged, and are subject to attachment and sale for debts.
2. The life tenant must keep the property wind and water tight. He is liable both for voluntary and permissive waste while the tenant at will is liable only for voluntary waste.

a. Nothing constitutes waste which is dictated by good.

III Curtesy. At common law the life estate of the husband in all of the estates of inheritance of which the wife was seised during coverture provided there was issue of the marriage born alive and capable of inheriting. By statute of 1902 curtesy and common law dower are now analogous.

IV Dower. The life estate of the wife in one-third of the estates of inheritance of which her husband was seised during coverture.

G Joint tenancies.

I Facts concerning:

1. Every joint tenancy must have four unities: Unity of time; Unity of title; Unity of possession; Unity of interest.
2. Joint tenancies can be created only by purchase, e.g. by will or by deed, but never by descent.
3. The chief distinguishing feature is the right of survivorship.
4. A conveyance by one joint tenant to a stranger makes the transferee a tenant in common as to the share thus transferred. In the interest so conveyed the right of survivorship is destroyed.

H Tenancies in common.

I Facts concerning:

1. A tenancy in common may have all four unities, but the only unity which is necessary is the unity of possession.
2. There is no right of survivorship in a tenancy in common, but there may be curtesy and dower.
3. If one co-tenant ousts the other from possession then,

then only, will an action in trespass lie.

4. One tenant in common is ordinarily not liable to his co-tenant for the cost of improvements or repairs.

I Tenancies by the entirety. Held by husband and wife together so long as both live and, after the death of either, by the survivor.

I Facts concerning:

1. All the four unities are present and also the unity of person.
2. A tenancy by the entirety is a species of joint tenancy.
3. An absolute divorce will terminate an estate by the entirety, but not a mere legal separation.
4. While coverture exists the husband has the entire use of the estate in entirety, and his right to the use, rents, and profits of the estate during coverture may be conveyed, leased mortgaged or assigned by him.
5. A tenant by the entirety is not entitled to have partition, at least without the consent of the other party of the tenancy.

II Deeds and Mortgages--lands conveyed between living parties.

1. Another summary.

In Indenture or Deed

In indenture or deed
Tho' a thousand you read
Neither comma nor colon you'll ken!
A stop intervening
Might determine the meaning
And what would the lawyers do then?
Chance for change of construction gives
chance for new flaws;
When the sense is once fixed; there's an
end of the cause.

Samuel Bishop.

When You Must Own a Home.

Dear Leon,

You are quite right, it is the buyer's market as far as real estate is concerned and the summer of 1933 will probably mark the lowest price level for many a year.

People surprise me so much by their lack of everyday knowledge when they come to purchase real estate. Mrs. Nash came to the office recently. She was frantic. She thought she was to own the old Marshall place on the River Road--had drawn her money from the bank, had sent her furniture over the road, and had that morning received a letter from Marshall that he "guessed they'd better not sell, Ma felt pretty bad about leaving the old place."

Leon, can you imagine the Nashes, intelligent people that they are, having gone to that point in their negotiations without having a scrap of paper to show their contract? If Marshall had been obdurate they would have lost out and I tell you that my heart was in my mouth when I drove out to see them that night. It was not any legal big stick which finally persuaded the old couple to sign the paper I carried with me. It cost the Nashes two hundred additional dollars to learn that any contract concerning buying or selling of real estate must be evidenced by a writing signed by both parties in order to be enforceable against both in our courts.

I didn't mind the Nashes paying the Marshalls the additional money; it is a magnificent old place and well

worth all they paid and more. I told them in terms emphatic that they were exceedingly fortunate to get the property at any price. You see there is a most desirable shore site with the property and they have a scheme to commercialize it which may prove most excellent. This particular angle I didn't know until after the agreement to purchase had been signed. Then I asked them if they had had the title examined. Of course, the answer was no. I was most uneasy for I had visions that the land might be restricted but luck was with them and they are having a delightful summer renovating the old place.

People seem to think, Leon, that money spent for title examination is money thrown away. I'll confess that the charges made by some of the title examiners approach highway robbery, but there are still honest people who charge honest prices and who do honest work. Miss C in my office is dependable to the extreme. She knows the work thoroughly and is careful and painstaking. I never worry about titles that she passes upon and her prices are right.

One man who was selling told me recently that my client didn't have to bother with any title examination, that he had paid \$5 six months before to have the title run down and that he bought the place after it had been in one family for one hundred and fifty years. I had great difficulty in persuading the would be purchaser to let Miss C check it over at a charge of \$35, even though I knew that that was the most dangerous piece of property to buy.

She unearthed so much trouble that the sale fell through. An old undischarged mortgage reared its head, heirs who had never signed off were discovered, traced to Pennsylvania but we couldn't go further with them they may be dead, or in distant climes, but they are the people who appear so unexpectedly on one's doorstep and make life miserable. The deal was off, and the would be vendor is a wiser man. He is raving over his five dollars. I told him he got all he paid for, a sense of security for six months. People are so foolish. If you find what you want, be sure that the agreement to sell is carefully and fully drawn up, all terms plainly stated, all rights defined. I always demand a warranty deed, it may be old fashioned but I prefer it and then be sure that a reliable title examiner passes on the title before you accept the deed and make payment.

Best wishes ever,

Williams v. Carty, 205 Mass. 396;
 Quinn v. Quinn, 260 Mass. 494;
 Potter v. Jacobs, 111 Mass. 32.

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William V. Dwyer, 305 Mass. 325
 Quinn v. Quinn, 380 Mass. 494
 Potter v. Jacobs, 111 Mass. 33

The Requisites of a Valid Deed.

Dear Leon,

So you have finally bought on Glenview Street. I hope you will be as enthusiastic over your purchase as we are over ours on Beacon Hill.

You can accomplish what you desire but not in the way you suggest. You tell me that the deed is in your name but that you wish it were in Arlie's for business reasons and wonder if before recording you could erase your first name and substitute hers. Such procedure would not give her title, Leon.

Land can be conveyed between living persons only by deed. When Harris delivered to you that instrument, signed and sealed, he gave you title and if you wish to give title to Arlie you too must prepare a deed properly signed and sealed and deliver it to her. Since 1912 in our state husbands and wives may deed directly to each other, but you cannot accomplish the result by merely substituting her name for yours in Harris's deed. One may destroy his deed but not his title. If you deed to her be sure that both deeds are placed on record in the Middlesex Registry because Arlington is in Middlesex County and whether you decide to deed to her or not put yours on record at once for only by having it recorded can you be sure of protecting your title against innocent purchasers. There is a well-known old case: A deeded to B in 1860 but B did not record his deed until

The Recognition of a Valid Deed.

Dear Leon,

So you have finally bought on Glenview Street. I hope you will be as enthusiastic over your purchase as we are over ours on Beacon Hill.

You can accomplish what you desire but not in the way you suggest. You tell me that the deed is in your name but that you wish it were in Alice's for business reasons and wonder if before recording you could have your first name and substitute here. Such procedure would not give her title, Leon.

Land can be conveyed between living persons only by deed. When Harris delivered to you that instrument, signed and sealed, he gave you title and if you wish to give title to Alice you too must prepare a deed properly signed and sealed and deliver it to her. Since 1918 in our state husband and wife may deed directly to each other, but you cannot accomplish the result by merely substituting her name for yours in Harris's deed. One may destroy his deed but not his title. If you deed to her be sure that both deeds are placed on record in the Middlesex Registry because Arlington is in Middlesex County and whether you decide to deed to her or not our laws on record at once for only by having it recorded can you be sure of protecting your title against innocent purchasers. There is a well-known old case: A deeded to B in 1880 but B did not record his deed until

1866. A died in 1864 and his son as his heir sold the place to C who had no knowledge of any prior rights of B, and C placed his deed on record in 1865 and C was the winner. Our recording statute favors the individual who first records his deed as long as he acts honestly. You say, "Oh those are things that never happen," but they do. Don't kid yourself.

As ever,

Carr v. Frye, 225 Mass. 531;
Chessman v. Whittemore 23 Pick. 231.

Sincerely yours,

1888. A died in 1884 and his son as his heir sold the place to C who had no knowledge of any prior rights of B, and C placed his deed on record in 1885 and C was the winner. Our recording statute favors the individual who first records his deed as long as he acts honestly. You say, "Oh those are things that never happen," but they do. Don't kid yourself. As ever,

Wm. V. Rice, 225 West 54th St.
 New York, N. Y.

The Mortgage and the Insurance Policy.

Dear Mr. Razee,

There is a provision in the General Laws which does provide that if the mortgaged premises are transferred without the assent of the insurance company that the policy is null and void but that provision has been interpreted to refer to the mortgagor or the person to whom he has conveyed and as a mortgagee you are not affected at all. Where the building has been destroyed by fire you are entitled to the amount of the mortgage from the insurance company, for the policy is made out in your name as your interest shall appear. However since Mr. Allen sold his equity in the premises without getting in touch with the company the Globe people will ask you to assign to them the note and the mortgage that they may look either to the land or to the mortgagor for the amount paid to you. In this way the statute is made vital.

I am writing promptly that your mind may be satisfied. You see your informant told the truth,- but not the whole truth,- and as a result you were a bit uncertain as to whether you lost or won. You win.

Sincerely yours,

General Laws (Ter. Ed.) Ch. 175, s. 99;
Whiting v. Burkhardt, 178 Mass. 535.

The Mortgage and the Insurance Policy.

Dear Mr. Bates,

There is a provision in the General Laws which does provide that if the mortgaged premises are transferred without the assent of the insurance company that the policy is null and void but that provision has been interpreted to refer to the mortgagor or the person to whom he has conveyed and as a mortgagee you are not affected at all. Where the building has been destroyed by fire you are entitled to the amount of the mortgage from the insurance company, for the policy is made out in your name as your interest shall appear. However since Mr. Allen sold his equity in the premises without getting in touch with the company the Globe people will ask you to assign to them the note and the mortgage that they may look either to the land or to the mortgagor for the amount paid to you. In this way the statute is made vital.

I am writing promptly that your mind may be satisfied. You see your informant told the truth, - but not the whole truth, - and as a result you were a bit uncertain as to whether you lost or won. You win.

Sincerely yours,

General Laws (Vol. 22, p. 178, c. 80;
Whiting v. Burkhart, 178 Mass. 258.

Second Mortgagees Considered

Dear Mr. Finley,

There was a time when people used to speak of investments being as sound as real estate, but that day seems to be gone forever.

As the market is, I fear very much that if the first mortgagee forecloses on the Greene property, as he is now threatening to do, that your second mortgage will be completely wiped out. That property has never justified the two mortgages, a first mortgage of \$10,000 and a second of \$6,000 mean a burden under which the mortgagor with decreased rentals can hardly continue to stand up. He will be obliged to let it go and I think him wise not to attempt longer to stagger under the load.

But if the first mortgagee forecloses, I doubt if the sale will bring enough to cover the first mortgage even, and there will be nothing left for you.

It is true that you still hold a note as does the first mortgagee and the mortgagor will continue to be liable on those notes. However, one can hardly get water from an empty well. If Greene has to let the foreclosure sale go through, I doubt if he will have money with which to meet any unpaid balance on the first mortgage, to say nothing of the second.

If you felt the place was worth the amount of the first mortgage, it might not be a bad idea, if you have

Second Mortgages Considered

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There was a time when people used to speak of investments being as sound as real estate, but that day seems to be gone forever.

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But if the first mortgage forecloses, I doubt if the sale will bring enough to cover the first mortgage even, and there will be nothing left for you.

It is true that you still hold a note as does the first mortgage and the mortgagor will continue to be liable on those notes. However, one can hardly get water from an empty well. If Greene has to let the foreclosures sale go through, I doubt if he will have money with which to meet any unpaid balance on the first mortgage, to say nothing of the second.

If you felt the place was worth the amount of the first mortgage, it might not be a bad idea. If you have

\$10,000 available, to pay the first mortgage and get an assignment of it. Then you might be able to foreclose and hold the property till the dawn of a better day.

Truly yours,

Cook v. Basley, 123 Mass. 396.

\$10,000 available, to pay the first mortgage and get an assignment of it. Then you might be able to foreclose and hold the property till the dawn of a better day.

Truly yours,

Good v. Bailey, 123 Mass. 298.

DEEDS

A Deeds in use in MassachusettsI The Warranty Deed.

1. The granting words of a warranty deed are "give, grant bargain, sell and convey."
2. The long form warranty deed covenants as follows:
 "I hereby for myself and my heirs, executors, and administrators, covenant with the grantee and his heirs and assigns that I am lawfully seized in fee simple of the granted premises; that they are free from all incumbrances, that I have good right to sell and convey the same as aforesaid; and that I will, and my heirs, executors, and administrators shall, warrant and defend the same to the grantee and his heirs and assigns forever against the lawful claims and demands of all persons."

II The Quit Claim Deed.

1. The granting words are "remise, release and forever quitclaim."
2. The covenants commonly appearing in the long form quitclaim deed are as follows:
 "And I hereby, for myself and my heirs, executors and administrators, covenant with the grantee, and his heirs and assigns that the released premises are free from all incumbrances made or suffered by me, and that I will and my heirs, executors and administrators shall, warrant and defend the same to the grantee and his heirs and assigns against the lawful claims and demands of all persons claiming by, through or under me, but against no other."

III The Short Forms Act, passed in 1912 effective January 1, 1913, provides shorter forms both for warranty and quitclaim deeds.

1. The short form warranty deed is expressed "with warranty covenants," while the short form quitclaim deed states simply "with quitclaim covenants."

IV Grantors and Grantees.

1. The deed of an insane person under guardianship is absolutely void, but if not under guardianship, his deed is voidable only. The paramount right of infants and insane persons to avoid their deeds may be exercised against an innocent purchaser for value from the grantee.
2. If not named grantees must be ascertained by description so as to be distinguished from all others.
3. Since January 1, 1923 property may be deeded to a partnership in the partnership name.
4. If the name of the grantee has been left blank and authority given to an agent to fill in such blank such authority in Massachusetts must be under seal to make a conveyance valid if the grantee is cognizant of the blank.

2. Words in use in Massachusetts

I. The Warranty Deed.

1. The granting words of a warranty deed are "give, grant, bargain, sell and convey."

2. The long form warranty deed contains the following:

"I hereby for myself and my heirs, executors, and administrators, covenant with the grantees and his heirs and assigns that I am lawfully seized in fee simple of the granted premises; that they are free from all incumbrances, that I have good right to sell and convey the same as aforesaid; and that I will, my heirs, executors, and administrators shall, warrant and defend the same to the grantees and his heirs and assigns forever against the lawful claims and demands of all persons."

II. The Gift Deed.

1. The granting words are "grant, release and forever give."

2. The covenants commonly appearing in the long form gift deed are as follows:

"And I hereby, for myself and my heirs, executors and administrators, covenant with the grantees, and his heirs and assigns that the released premises are free from all incumbrances past or suffered by me, and that I will and my heirs, executors and administrators shall, warrant and defend the same to the grantees and his heirs and assigns against the lawful claims and demands of all persons claiming by, through or under me, but against no other."

III. The Short Form Deed. Passed in 1916 effective January 1, 1917.

provides shorter forms both for warranty and gift deeds.

1. The short form warranty deed is expressed "with warranty covenants," while the short form gift deed states simply "with gift covenants."

IV. Covenants and Conditions.

1. The deed of an insane person under guardianship is absolutely void, but it has no effect if the guardian, his heirs and assigns only. The person's right of insane and

insane persons to grant their deeds may be exercised against an innocent purchaser for value from the grantee.

2. If no name of person who is represented by description as to be distinguished from all others.

3. Since January 1, 1918 property may be granted to a person and to the partnership name.

4. If the name of the grantee has been left blank and nothing given to an agent to fill in such blank and nothing is in Massachusetts and he under seal to make a

conveyance valid if the grantee is cognate to the blank.

V Consideration.

1. Actual want of consideration is not good ground, in the absence of fraud, for the avoidance of a deed by the grantor. The seal purports consideration.
2. In Massachusetts the clause in the deed acknowledging consideration affords only prima facie proof of the fact, and may be rebutted by parol evidence.
 - a. It is not competent to show that no consideration was paid, only that the consideration was greater or less than that named, or altogether different from it.

VI Proper Execution of a Deed.

1. To be valid even between the parties a deed must be signed, sealed, and delivered, and for the purposes of recording it must be acknowledged. Acknowledgment by one grantor is sufficient.
 - a. The signing may be by mark or by the hand of another person in the grantor's presence.
 - b. Since 1929 no attached seal is required if the grantor recites in the instrument that "this is a sealed instrument."
 - c. Delivery may be actual physical delivery to the grantee or delivery to an agent or in escrow, but in order to have a valid delivery there must have been intent to deliver.
 - (1) By statute the recording of a deed by the grantor is conclusive evidence of delivery in favor of innocent purchasers for value.
2. To be binding upon purchasers from the grantor without notice the deed must be recorded in the county in which the land lies.
 - a. Deeds between husband and wife are not effective to pass title between them unless and until acknowledged and recorded during the lifetime of both.

VII Validity of a Deed.

1. If a deed was obtained through misrepresentations, fraud, duress or undue influence equity will set it aside.
2. If through accident or mistake the deed fails to convey the tract of land concerning which the agreement was made equity will reform the deed if possible.
 - a. To enlarge a deed the Statute of Frauds must have been satisfied either by a writing or part performance.

B The Parts of the Deed

I Premises.

1. In a warranty deed the granting words are "give, grant, bargain, sell and convey"; in a quitclaim deed, "remise, release and forever quitclaim."
2. A grant of land carries with "all rights, easements; privileges and appurtenances."
3. In order that title to land may pass by deed, it must be

VI Consideration

1. Actual want of consideration is not good ground, in the absence of fraud, for the avoidance of a deed by the grantor. The deed purports consideration.
2. In determining the value in the deed, consideration is not to be taken into account only when it is given to the grantor, and may be taken into account when it is given to a third party.
3. It is not competent to show that no consideration was paid, only that the consideration was greater or less than that named, or altogether different from it.

VII Proper Delivery of a Deed

1. To be valid when between two parties a deed must be signed, sealed, and delivered, and for the purpose of delivery it must be acknowledged. Acknowledgment by the grantor is sufficient.
2. The delivery may be by gift or by sale or by another person in the grantor's presence.
3. Since a deed is intended to be delivered at the time it is made, it is not necessary that it be a sealed instrument.
4. Delivery may be actual physical delivery to the grantee or delivery to an agent or to a third party, but in order to have a valid delivery there must have been intent to deliver.
5. By statute the recording of a deed by the grantor is conclusive evidence of delivery in favor of innocent purchasers for value.
6. To be binding upon purchasers from the grantor without notice the deed must be recorded in the county in which the land lies.
7. Deeds between husband and wife are not enforceable as to each other unless they are acknowledged together and recorded during the lifetime of both.

VIII Validity of a Deed

1. If a deed was obtained through fraud, duress, or undue influence equity will set it aside.
2. If through accident or mistake the deed fails to convey the tract of land concerning which the agreement was made equity will reform the deed if possible.
3. To subject a deed the Statute of Frauds must have been satisfied either by a writing or by part performance.

IX The Parts of the Deed

I Preamble

1. In a warranty deed the granting words are "I, the grantor, do hereby sell and convey unto the grantee, his heirs and assigns forever..."
2. A grant of land carries with it all rights, appurtenances and appurtenances.
3. In order that title to land may pass by deed, it must be

described by metes and bounds, or by a general description.

a. Description by metes and bounds may be divided into two classes:

- (1) Those where the premises are described at length, and
- (2) Those in which such a description is incorporated by reference to another deed or plan.
 - (a) Be sure that the reference incorporates and is not a mere title reference.
 - (b) An incorporated reference may build up a prior description but it can never cut it down.

b. Where land is described in reference to monuments the following rules have been laid down.

- (1) If the land is described by courses and distances and also by monuments which are certain, monuments govern, and the measurements, if they do not correspond must yield.
- (2) If land is described as extending "to" a non-navigable stream, the land conveyed extends to the thread of the stream, but if the stream is navigable the land extends to low water mark.
- (3) If the description is "to the bank," the land conveyed does not extend to the thread of the stream.
- (4) If a natural pond has a definite low water mark, the presumption is that title to land described as "extending to the pond" extends to the low water line. If an artificial pond is raised by dam the presumption is that title extends to the thread of the stream.
- (5) Ownership "on the seashore" is to low water mark, subject to the right of the public to fish, fowl and navigate but not to bathe. The low water mark must not exceed 100 rods in width from the high water mark.
- (6) If land is bounded "By the highway," public or private title extends to the middle if the grantor owns that far.
- (7) If the description reads "beginning at the stake and stone on the southerly side of the road--thence by said road," then the boundary follows along the side of the road.

II Habendum. The part which usually describes the quantum of the estate granted.

1. Today by G. L. Ch. 183, s. 13, "heirs" or "assigns" or "other technical words of inheritance shall not be necessary to convey or reserve an estate in fee."

III Reddendum. That portion of a deed which contains reservations, exceptions, conditions or restrictions if any.

1. A reservation is a new and independent right or interest

in favor of the grantor (but not of a stranger) which he did not before enjoy.

- a. Whether a provision is an exception or a reservation does not depend upon the use of the word "reserving" or "excepting."
 - b. Prior to 1912 if a reservation was to be more than a life estate the word "heirs" was needed.
2. An exception is an existing right or interest in the grantor which is excluded from the conveyance.
- a. No words of inheritance were ever necessary in case of an exception.
3. Restrictions. These are contract stipulations, or covenants inserted in the deed, the violation of which may be restrained by injunction, or may be made the basis of an action for damages. The violation of such restriction does not, however, work a forfeiture of the estate. The courts favor restrictions rather than conditions for this reason.
- a. If a deed is given under a General Improvement scheme rights may arise against a grantee and his assignees in other lot holders whose deeds are subject to similar restrictions.
 - (1) If no such improvement scheme is found no action could be brought except by the original grantor or his assignees.

IV Covenants

1. In a warranty deed.

- a. The covenants of seisin, of title or right to convey, and against incumbrances, are broken, if at all, at the moment of the delivery of the deed, and so become a chose in action which by law is not assignable.
- b. The covenant of warranty runs with the land conveyed and any heir or assignee of the grantee, to whom the estate may afterwards come, is entitled, whether heirs, and assigns of the grantee are, or are not mentioned in the covenant, to maintain an action upon it in case of breach.
 - (1) If a grantor by warranty deed conveys to an innocent purchaser, land to which he has no title, any subsequent acquired title will enure to the benefit of the purchaser and his assignees.
 - (a) If the deed is a quitclaim deed subsequently acquired title does not pass unless such is the clear intention.
 - (b) In order to constitute a breach of the covenant of warranty it is necessary that there should be not only a want or defect of title, but an actual eviction or ouster or what in law is deemed equivalent thereto.

is favor of the grantor (and not of a transferee) when he did not believe so.

2. Whether a provision is an exception to a restriction does not depend upon the use of the word "exception," "in," or "excepting."

3. Prior to 1911 a restriction was to be more than a life estate the word "estate" was needed.

4. An exception is an existing right or interest in the grantor which is excluded from the conveyance.

5. No words of inheritance were ever necessary in case of an exception.

6. Restraints. These are covenants, stipulations, or conditions inserted in the deed, the violation of which may be restrained by injunction, or may be made the basis of an action for damages. The violation of such restriction does not, however, work a forfeiture of the estate. The courts favor restrictions rather than conditions for this reason.

7. If a deed is given under a General Inheritance Act, no rights may arise against a transferee and his estate in other lot holders whose deeds are subject to similar restrictions.

(1) If no such Inheritance Act is found in the State could be brought against the original grantor or his assigns.

IV Covenants

A. Is a warranty deed

1. The covenants of title, of title or right to convey, and quiet enjoyment, are implied in all deeds, and as at the moment of the delivery of the deed, and as because a deed is action which is law in that state.

2. The covenant of warranty runs with the land conveyed and any part or assignee of the grantor, so when the estate was afterwards conveyed, is entitled to the same rights, and assignee of the grantor may or may not be mentioned in the deed, so whether an action upon it in case of breach.

(1) If a grantor by warranty deed conveys to an innocent purchaser, land to which he has no title, any subsequent acquired title will inure to the benefit of the purchaser and his assigns.

(a) If the deed is a warranty deed when expressly acquired title does not pass unless such is the clear intention.

(b) In order to constitute a breach of the covenant of warranty it is necessary that there should be not only a want of defect of title, but an actual violation or ouster or what in law is deemed equivalent thereto.

Are You a Tenant at Will or for Years?

Dear Mr. Fletcher,

The paper which you brought into the office reads, "to lease you the land at the corner of Elm and Maple streets for use as a parking space for a period of three years or until such time as the party of the first part should have an opportunity to sell."

It is the last clause which defeats your contention. The paper does not constitute a lease as you contend, for a lease has to be in writing and for a definite period of time. Unfortunately, the last clause makes the time indefinite. If you are not holding under a lease you are, instead, but a tenant at will, whose tenancy can be terminated at any time by giving a notice in writing equal to your rental period and to take effect upon a rental day, or you may be leased out, for any lease given by the lessor terminates your tenancy.

Tenants at will can be created either orally, or in writing, but if by a writing the term must be indefinite as it is here.

Under the circumstances, you have no choice except to vacate, even though the man is not selling, but leasing the parking space to another.

Truly yours,

143
Are You a Tenant at Will or for Years?

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Tenants at will can be created either orally, or in writing, but if by a writing the term must be indefinite as it is here.

Under the circumstances, you have no choice except to vacate, even though the man is not selling, but leasing the parking space to another.

Truly yours,

Barrett A. Wilson, 344 West 33rd

III Landlord and Tenant.

1. For the benefit of those who own and those who hire.

Certum est quod certum reddi potest

"That is certain which can be made certain in some way",

And, therefore, if the lessor, in a lease for years, should say

"For so many years as J may name", uncertainty there's none,

Since J has power to fix the term of years the lease may run.

Nullus commodum capere potest de injuria sua propria

Of his own wrong, no suitor can in law, advantage take

And therefore if a party to a lease condition break

Whence, by its terms, the lease is void, he still by it is tried

The option to avoid the lease rests with the other side.

Latin Maxims
Foster

Even a Landlord Has Rights

Dear Clara,

It was pleasant indeed to see you again last evening, but I confess I was selfish enough to be sorry to find other guests and really I was infuriated by Miss Smith, whoever she may be.

Forgive me, but I surely went away with the feeling that she had the making of a first-class crook and that she, because of her money and position, was no better than the lowest street trickster. In fact, I think I resent trickery and lying more in a person of her apparent attainment and means than in the person who has never had a square deal out of life. If I had ever opened my mouth last night it would have been too bad, for I should have enjoyed telling her what I thought of her methods. People have strange ideas of humor and fair dealing.

As you well know, Frances and I have had more than one lease on this hill. Twice we have moved during the lease, but never for a moment have we thought of jumping the obligation. Doesn't one's word mean anything to him? Apparently it doesn't to her. I recall the apartment we had on West Cedar Street. We expected to sign a lease; we agreed to sign one, and, although the agreement was not enforceable because the owner had no writing to that effect signed by us, when the time came that we wanted to leave, we told him that we would be responsible for the rent until we could provide

a substituted tenant for the expected period and we did. Even if one isn't legally bound, isn't he ever morally bound? Apparently she recognizes neither legal nor moral obligation.

You know I thought she showed the size of her soul when, with much delight, she related her method of handling the situation. When the time came to give a notice she gave it through her lawyer and demanded a return receipt. There are plenty of situations where such conduct is justified, but apparently she had always received fine treatment from him. You know I think people by that kind of pettiness bring on themselves the very thing they would prevent. It is a law of life that smallness begets smallness, and faith begets faith. I could have forgiven her that and accepted her as a shrewd, calculating person, but when she told how she lied as to the amount she could pay, and how she put the other tenants up to the game, so that the owner faced the alternative of an empty house or complying with their unreasonable demands--well, I was furious.

What has brought this country today to its present condition except graft, crookedness, lying to one's fellow men, trickery? When I see a woman, educated, financially able, stooping to such means, I wonder if there is any hope for us. She surely left a bad taste with me, and I'm not even apologizing to you for thus criticizing your guest. Be thankful I was in your home and, of necessity, silent. Perhaps you noticed that I didn't say upon leaving that I was

delighted to have met her. I wasn't delighted she had
tended to destroy faith in women of my generation.

Dear Clara,

Still seeing red,

You say I have asked you, I have, my sense of
humor has come to the front. Will I tell you what I think
you ought to know concerning leases? Gladly.

In the first place, if you are taking a lease of
that apartment on Fishway Street, be sure that you get the
things done before you sign any lease, in fact before you
move in. You know nothing of the owner and if he has agreed
to paper and paint in consideration of not taking a lease
for three years, you can safely sign the agreement to take
a lease when the work is done. To your satisfaction, but it
isn't safe to sign the lease. I suggest I stop. I suggest I stop.
I don't want to prolong my criticism of you. I don't
criticize if he does, but at least the agreement should read,
if he asks for your signature on one, that the work will be
done in "a workman-like fashion."

When all is in readiness and you are presented with
the lease, read it carefully. It will probably be a form
lease, and there will be a clause for the landlord and
not tenants, I assure you. You will be wise to understand
it thoroughly. In the first place, note if you are signing
one of those renewal things which call for notice one month
or two months before the period is up. They are all right,
but they are dangerous because it is easy to forget the day
on which you must notify the landlord of your desire to quit;

The Lease and Its Multiplicity of Terms

Dear Clara,

You hope I have cooled down. I have, my sense of humor has come to the front. Will I tell you what I think you ought to know concerning leases? Gladly.

In the first place, if you are taking a lease of that apartment on Pinckney Street, be sure that you get the things done before you sign any lease, in fact before you move in. You know nothing of the owner and if he has agreed to paper and paint in consideration of your taking a lease for three years, you can safely sign the agreement "to take a lease when the work is done" to your satisfaction, but it isn't safe to sign the lease. Note I suggest "your satisfaction." He may be unwilling to promise that and I don't criticize if he does, but at least the agreement should read, if he asks for your signature on one, that the work will be done in "a workman-like fashion."

When all is in readiness and you are presented with the lease, read it carefully. It will probably be a form lease, and those are drawn for the benefit of landlords and not tenants, I assure you. You will be wise to understand it thoroughly. In the first place, note if you are signing one of those renewal things which call for notice one month or two months before the period is up. They are all right, but they are dangerous because it is easy to forget the day on which you must notify the landlord of your desire to quit;

and if you do forget, you are once more a lessee for another period of similar duration. If possible, see that the provision is eliminated.

Again, remember that unless the landlord agrees to repair you are liable for the repairs and you should not be. Frequently leases provide that the landlord may enter to see if the premises are in need of repair. That provision does not help you; it merely enables him to look over the premises without being a trespasser. The ideal provision concerning repairs from your standpoint is to have him covenant that he will repair and maintain the premises in good condition.

Read carefully the provisions that would make you liable for any one injured upon the premises, the provisions which would prevent you from driving nails into the walls and making reasonable use of the house, the provisions which would prevent you from assigning your lease to another without his consent, and a dozen other prohibitions. After you have weighed the meaning of all of these things then proceed to have them stricken out.

Another thing, Clara, try to get a provision inserted that the lease would be terminated upon your death. If that provision is not put in, your estate would be liable for the rent for the balance of the term, and that is most unfortunate. A landlord has just collected the rent for three years from the estate of a Boston school teacher who

died very shortly after she had entered into the lease.

It is wise to have the right of renewal and a provision that you shall pay at the same rental for such time as you hold over after the expiration of the lease. The value of this last provision depends, of course, on the hope that we are facing better days and that rents may advance.

One last word, perhaps before you sign that lease it would be wise to let your lawyer friend read it over.

Sincerely ever,

Kimball v. Cross, 136 Mass. 300;
Kabley v. Worcester Gas Light Co., 102 Mass 392.

The man will then become liable to Mr. Orchard, the landlord, because of privity of estate, upon the covenants of the lease. The seal will establish liability whether he enters into occupation or not, and without it he would not be liable for the rent until he took possession. You, too, will remain liable to Mr. Orchard because of privity of contract, so if he does not get the seal from the man whom he will look to you. Let us hope there is no reason for that to happen. The ideal thing would be if the landlord would give you a release in writing and take Mr. Harvard Man in your place, but he is not liable to do that.

All About Assigning

Dear Mrs. Davis,

You may either assign or sublet your apartment in Cambridge for the balance of your lease, and I think you are very fortunate to find a Harvard Instructor who is willing to take it over. That will enable you to go to Florida for the winter, and enjoy the warmth and sunshine of that play-time land.

I would suggest that you assign by passing over to him your lease on which you have endorsed the following, "In consideration of one dollar and other valuable consideration I hereby assign and set over unto ----- all my right, title and interest to the within lease." Follow this statement by a seal and your signature.

The man will then become liable to Mr. Orchard, the landlord, because of privity of estate, upon the covenants of the lease. The seal will establish liability whether he enters into occupation or not, and without it he would not be liable for the rent until he took possession.

You, too, will remain liable to Mr. Orchard because of privity of contract, so if he does not get the rent from the new tenant he will look to you. Let us hope there is no reason for that to happen. The ideal thing would be if the landlord would give you a release in writing and take Mr. Harvard Man in your place, but he is not liable to do that.

There is one problem about an assignee. He can ever escape future liability by assigning to another regardless of whom that person may be. Thereby he destroys his privity of estate. But this man will be at Harvard through the school year, and as your lease expires in May I don't believe that you will have any difficulty.

It is much better to assign than sublet whenever possible. Subletting means that you still keep control and the rent would be paid to you and you, in turn, would take care of the landlord. By assigning you are freed from far more anxiety.

Have I answered your questions?

Cordially yours,

Saunders v. Partridge, 100 Mass. 556;
 Collins v. Pratt, 181 Mass. 345;
 Farrington v. Kimball, 126 Mass. 313;
 Bailey v. Meade, 250 Mass. 46.

Repairs and Injuries

Dear Margaret,

We had a tragic case come in the office recently. A woman hired an apartment on the third floor of one of these three-decker affairs. She had five rooms and a back porch, and after a time one of the posts on the piazza seemed to be weak and rotten at the base. She showed it to the landlord when he collected the rent but nothing was done about it, nor do I think he even promised to do anything.

Last week, her small youngster, four years old, racing up and down the porch crashed into the piazza railing close by the post and it gave way and he was hurled to the yard below and killed.

There is no legal right to recover, Margaret. Landlords are under no duty to repair premises under the exclusive control of tenants unless they contract to do so at the time of letting. The tenant is responsible for repairs and, because in control, he is liable for injuries caused by the defective conditions.

I have been almost ill over the tragedy of it all.

Devotedly,

Jordan v. Sullivan, 181 Mass. 348;
Salsman v. Frisch, 276 Mass. 228;
Cormier v. Weener, 277 Mass. 518.

Ousted or Not Ousted and The Results Arising

Dear Alma,

Your letter reminded me of the winter Frances and I put in on Pinckney Street. I cannot tell you how thankful we have been during this charming season of zero and sub-zero days to be in our own home, running our own oil heater.

Many a morning, I studied with overshoes on, a bath robe and heavy coat. Frances used to say she got breakfast in her fur-lined gloves. Rarely would the thermometer go above 58° during the forenoon in that \$90 a month apartment. It may have been healthy, but it was decidedly uncomfortable.

We used to talk about our rights. We did make a complaint to the Housing Commission. We could have moved out and avoided future rent on the ground that his failure to supply us with heat constituted a constructive eviction, that is, a deliberate taking away from us of our enjoyment of the property.

There are two kinds of evictions, an actual eviction, the physical deprivation of the tenant of some part of the premises let, and the constructive eviction of which I have just written.

A man hired a house, found the attic locked. The landlord refused the key to the attic, and the tenant occupied the rest of the house for the year and paid no rent.

None could be collected from him for the eviction was actual.

On the other hand, a tenant in the Little Building lost her key and was denied the right to have another made by the persons in authority. She had access to her office because the door was unlocked, but she had no enjoyment of the premises. The lessor's act was a deliberate one, it deprived her of rights in the premises and during the term of the lease she moved out and was not liable for the rent for the remainder of the period.

If you decide that the landlord is making no effort to give you heat, you may move out if you do so while the weather is cold. You could hardly wait until spring, blessed word, and then expect to depart without liability.

Let me hear from you again, before you really leap.

Sincerely yours,

Moore v. Mansfield, 182 Mass. 302;
 Smith v. McEnaney, 170 Mass. 26;
 Winchester v. O'Brien, 266 Mass. 33;
 Longwood Towers v. Doyle, 267 Mass. 368.

LANDLORD AND TENANT LAW SUMMARIZED

A. The Relationship Established.

The relation of landlord and tenant arises only by virtue of a contract, express or implied, under which one occupies or has possession of the land of another either for a definite period of time or at will.

I Kinds of Tenancies.

1. For years--when holding under a written lease for a definite period of time, even though for less than a year.
2. At will--exists when there is an oral demise or written lease for an indefinite time.
3. At sufferance--exists when one remains on premises after right to hold has expired though his original entry was lawful.

B. The Lease.

I Facts concerning.

1. Leases should be made in duplicate, and signed by both lessor and lessee.
2. A lease should be under seal, but so slight is the interest in land that lease is valid between the parties and those having actual notice even though it is not a sealed instrument.
3. Oral evidence is not admissible to contradict or modify a written lease.
4. A lease becomes effective to vest the estate in the lessee upon its delivery and if no time is named in the lease for the commencement of the term the date of delivery fixes the time.

II The Lease Obtained by Fraud.

1. A lease obtained by fraudulent misrepresentation is voidable.
 - a. The right to rescind may be lost by acquiescence.
2. A lease made with the intent that the premises be used for any unlawful purpose is absolutely void.
3. A lease made on Sunday is void.
 - a. If the lessee under a Sunday lease subsequently enters and occupies he is liable for use and occupation.

III Subject Matter Included in a Lease.

1. A lease of a building passes the land on which it stands and also all land adjacent thereto.
 - a. Because of this fact the lessee continues to be liable for rent even though the building is destroyed by fire unless the lease provides otherwise.
2. Where different floors of a building are let to different persons a lease of any one floor carries no estate in the land under the building.

IV Recording of Leases.

1. Under the following conditions leases must be recorded in

the Registry of Deeds in the County where the land lies in order to be valid and binding against persons other than the immediate parties, their assigns and heirs, and parties with actual notice.

- a. If a lease is given for more than seven years.
- b. If for less than seven years if the right of renewal would carry it beyond seven.
- c. If for a term of less than seven years, but not to take effect until the expiration of such time as would bring its termination beyond the seven years.

C. Assignment and Sub-letting of Leases.

I What Constitutes an Assignment.

1. If a lessee transfers his entire interest to another for his whole or remaining term it is an assignment.
2. A transfer of less than the whole interest, or the whole interest for a period less than the balance of the term, is a sub-lease.

II Form of the Assignment or Sub-Lease.

1. An endorsement on the back of the lease stating that the lessee transfers "all right, title and interest in and to the within lease" includes whatever lease-hold estate the lessor has and satisfies the Statute of Frauds.
 - a. Inasmuch as leases are under seal the assignment itself should be under seal.
 - b. If the assignment is not under seal the assignee is liable only for rent during possession; if the assignment was under seal, the assignee is liable regardless of entry or possession.

III Liability of an Assignee of a Lessee to the Original Lessor.

1. An assignee is liable to the lessor on all covenants which run with the land because of privity of estate. The lessee also remains liable because of privity of contract.
 - a. Because the assignee's liability to the original lessor depends on privity of estate he may always escape liability for breaches of covenant after he gets rid of the term by assigning the term to another.
2. An assignee cannot maintain an action against the lessor for breach of a covenant running with the land which took place before the assignment to him because a right to sue is a chose in action which does not run with the land.

IV Liability of Parties under a Sub-Lease.

1. The lessee and not the sub-lessee is liable to the lessor for breach of covenants under the lease.
2. The sub-lessee must look to his lessor, the original lessee, for remedies.

D. Covenants in the Lease, Express and Implied.

I Covenants in a lease are the agreements under seal; they may be either personal covenants or covenants which run with the land.

1. Covenants which run with the land bind whoever is an assignee of the leased premises; personal covenants bind only the original lessor and original lessee.

a. All covenants may be made to bind the assigns of either the lessor or lessee by the insertion of the word "assigns."

Covenants which run with the land define the manner in which the premises shall be enjoyed or dealt with. Included are the covenants to pay rent, taxes, not to use the premises unlawfully, to use the premises for a certain purpose, to renew the lease, quiet enjoyment, the covenant to repair, to make improvements.

The right to sue for breach of a covenant running with the land is a chose in action which does not itself run with the land; hence an assignee cannot maintain an action against the other party to the lease for a breach which took place before the assignment.

II Dependent and independent covenants.

1. Dependent covenants are to be performed only upon performance of some covenant by the other party.

a. Only two covenants are impliedly dependent:

The covenant of quiet enjoyment and the covenant to pay rent.

(1) A breach of a covenant of quiet enjoyment is brought about by an eviction, actual or constructive; in either case the tenant may defend in an action for rent. If an actual eviction from any portion of the premises the tenant may defend though still on the premises, but in case of a constructive eviction, only if he leaves the premises.

III The Covenant to Pay Rent.

1. If expressly inserted in the lease the lessee is liable for all rent which may become due during the term.

2. Rent may be paid in anything of value, and it is payable up to midnight of the day it is due unless there is an agreement to the contrary.

3. The provision for payment of rent at the rate specified "for such further time as he may hold" does not give the tenant the right to hold over. He would still be a tenant at sufferance and by statute liable for such time as he occupies.

a. Without the provision the landlord could recover the fair value; with the provision rent can be recovered at the rate specified.

4. A guaranty of rent must be in writing and should be under seal unless consideration can be shown.

IV The Covenant to Make Repairs.

1. Unless there is an express covenant on the part of the lessor to repair the duty is upon the lessee, reasonable wear and tear expected.

2. A provision that the tenant "will allow the lessor and his heirs--to enter and examine the condition of the premises and make necessary repairs" does not impose

any liability on the lessor or lessen the duty of the lessee.

3. If the lessor covenants to repair there is no liability until he has had reasonable notice of the need of repairs.

- a. Exception: If the landlord covenants to repair, and "to maintain the premises for and during the term of" the lease, he is liable without notice in either contract or tort.

4. Even though the landlord has expressly covenanted to repair, if the premises become unfit for the purposes for which they were leased, the tenant has no right to leave the premises or to refuse to pay rent.

5. If the lease is of entire building the lessee must rebuild in case of fire unless the exception as to fire is inserted in the lease.

V The Covenant of Title and Quiet Enjoyment.

1. Such covenant is always present either expressly or impliedly, and carries with it the thought that the landlord will do nothing to interrupt the free and peaceable enjoyment of the thing granted.

- a. While it includes any act done by the lessor or those claiming under him, or by title paramount, under which the lessee is ousted or deprived of substantial benefit which was given to him by the lease, it does not extend to acts of wrongdoers or strangers. It does not include taking by eminent domain.

2. The covenant of quiet enjoyment is broken by an eviction, actual or constructive.

- a. An actual eviction is the physical deprivation of the whole or a part of the premises demised.

- (1) If there is an actual eviction, though of only a part of the premises, the tenant may abandon the lease and defend against any claim for rent.

- b. A constructive eviction consists of acts not amounting to an expulsion, or physical deprivation, but such an eviction as substantially diminishes the enjoyment and which is committed by the lessor with the intent to deprive the lessee of the enjoyment of the demised premises.

- (1) In such an eviction the tenant may leave and defend against an action for rent, but if he remain in he will be liable for the rent.

VI The Covenant of Fitness.

1. Such a covenant is implied in three instances only:

- a. Over such portions of the premises as the landlord continues to control--common stairways, entries, roofs, gutters, etc.

- b. In case of concealed defects. If the owner lets premises which are not merely defective, but

which contain positive agencies of injury he is liable if it appears that he knew of the defect or should have known of it.

c. In the case of furnished dwellings there is an implied warranty that the premises are reasonably fit for occupancy.

2. Otherwise there is no implied covenant that the building is fit for habitation or for any particular purpose, nor is there any implied warranty that the premises, even if fit at the time of letting, will continue fit for any particular use. The doctrine of caveat emptor applies.

E. Liability for Injuries.

I Liability of Landlord to Tenant for Injuries.

1. If the landlord is liable at all his liability extends not only to the tenant but to members of his family and to those who are there through his express or implied invitation.
2. Prior to the entry of the tenant the landlord is liable to him alone, and only in contract; but after entry the liability extends to all persons for whose benefit the lease was taken and the liability is in tort.
3. Inasmuch as the landlord is not bound to change the conditions existing at the time of the letting, he is not liable for injuries sustained by the tenant, his family, or guests, caused by defective conditions in the demised premises unless they are concealed defects not discoverable on reasonable examination and of their existence the lessor knew or should have known.
4. If the injury arises because of failure to repair where the landlord has expressly agreed to repair and there has been the necessary notice the liability of the landlord is in contract, not in tort.
5. On such portions of the premises as the landlord continues in control he is liable for injuries sustained if he has not used due care to keep such portions in the same condition it was, or purported to be in, at the time of the letting and the liability is in tort.
 - a. The liability of a landlord does not extend for the benefit of those who come upon the premises for their own convenience, without any invitation either express or implied, or which may be implied from the preparation and adaptation of the premises for the purposes for which they are appropriated.
6. If the landlord who has contracted to repair does so negligently the right of recovery is not limited to the tenant personally, but includes all persons who within the contemplation of the parties were to use the premises under the hiring.
 - a. But if the landlord undertakes the repairs gratuitously he is liable only to the tenant or

person with whom he made the gratuitous undertaking and since 1917 liable only in case of gross negligence, except in cases where death is caused by the negligent act.

II To Whom the Injured Third Party May Look.

1. Usually the tenant alone is liable for injuries sustained by invited persons because of defective conditions, due to negligence, in the demised premises. The test is control.
2. If the injury is caused on passageways, elevators, etc., under the control of the landlord he is liable except in two instances:
 - a. If the person injured was an agent, guest or member of the family of the tenant, he cannot recover if the landlord maintained the premises "in as safe condition as they appeared to be at the time of letting." Such persons have no better rights than the tenant.
 - b. If the tenant has agreed to keep the common passageways in repair and to save the lessor harmless from injuries sustained thereon, the tenant, and not the landlord is liable to third persons for injuries caused by negligence.

F. Duty of the Tenant, to use the premises in a tenant-like manner.

I A tenant for years is liable both for permissive and voluntary waste while a tenant at will is liable only for voluntary waste.

1. Therefore if landlords would protect themselves from mere negligence of their tenant they should take a written lease.

G. The Tenancy for Years Terminated.

I By Forfeiture and Reentry by the landlord for breach of some condition in the lease, as forfeiture for nonpayment of taxes, for assigning or subletting, or for illegal use.

II By Forfeiture for Nonpayment of Rent.

1. Unless the right to reenter for nonpayment of rent is reserved in the lease the landlord must seek some other remedy for the courts lean against forfeitures and penalties.

III By Surrender of the Lease by Agreement of the Parties. G. L.

1. Such surrender must be in writing.

IV Surrender by Operation of Law.

1. Such surrender takes place only where there is a change of possession.

V By Eminent Domain Proceedings.

1. Both the lessor and the tenant for years are entitled to compensation.
2. If the taking is of the entire premises the lease is terminated.

VI By Eviction. Discussed previously

VII By Giving the Statutory Notice to Quit for Nonpayment of Rent.

G. L. c. 186, s. 11.

1. "Upon the neglect or refusal to pay rent due according to the terms of a written lease, fourteen days' notice to quit, given in writing by the landlord to the tenant, shall be sufficient to determine the lease unless the tenant, four days at least before the return day of the writ, in an action--to recover possession of the premises, pays or tenders to the landlord--all rent then due with interest thereon and costs of suit."

a. The notice must state with accuracy the time at which by law the tenant is required to vacate the premises. The statute is silent as to the precise mode of service.

b. The forfeiture does not become absolute until the fourteen days have run out, and payment or tender of rent before the expiration of the time will purge the forfeiture.

c. The notice determines not only the original demise but any sublease which the tenant may have made.

H. Termination of the Tenancy at Will.

I By Agreement.

1. A tenancy at will may be terminated on the happening of a condition subsequent--in which case no notice would be required unless contracted for.

II By Operation of Law.

1. By death of either party.

2. By sale or lease of the premises.

a. Such lessee or grantee may take possession after notifying the tenant of such lease or deed.

b. The burden is on the tenant at will who denies that his landlord's written lease to another terminates his estate to prove that such lease conveys no estate at all or one not greater than an estate at will.

3. By assignment by the tenant.

a. An assignment of his estate by a tenant at will terminates the tenancy without notice.

(1) The landlord may treat the assignee as a trespasser or maintain the statutory process to recover possession.

III By Notice to Quit. G. L. c. 186, s. 12.

1. "Estates at will may be terminated by either party by three months' notice in writing for that purpose given to the other party; and if the rent reserved is payable at periods of less than three months, the time of such notice shall be equivalent to the intervals between the days of payment."

a. The notice must fix the day of termination on a due day.

b. If a tenant at will quits the premises on a rent day without having given previous notice he remains liable and the burden is on him to show that the

E Not Contracts but Contacts, Torts and Crimes.

I Torts, wrongs against individuals.

1. The law summarized.

II Crimes, against society.

1. Salient facts.

"Thus the moralities which protect every individual from being harmed by others, either directly or by being hindered in his freedom of pursuing his own good, are at once those which he himself has most at heart, and those which he has the strongest interest in publishing and enforcing by word and deed. It is by a person's observance of these that his fitness to exist as one of the fellowship of human beings is tested and decided; for on that depends his being a nuisance or not to those with whom he is in contact."

From John Stuart Mill's
"Utilitarianism."

"Prisoner, your counsel thinks you are innocent, the prosecutor thinks you are innocent, and I think you are innocent. But a jury of your own countrymen have found you guilty and it remains that I should pass sentence upon you. You will be imprisoned for one day and as that day was yesterday you are free to go about your business."

The Lawyer in History, Literature
and Humor
Edited by William Andrews.

If the Dog Bites, What Then?

Dear Margaret,

So poor Bozo has gone to dog heaven, or the other place, and you are all heartbroken. Forgive me, I'm sorry that you are heartbroken, and I do sympathize with Junior for I know how close to a boy's heart is his dog, even if that dog, like Bozo, had some undesirable traits.

Of course, the dead always acquire a halo of glory, but if you will allow yourself to face the facts and recall a few of the escapades of last summer you will be willing to acknowledge that Bozo did possess a few unlovable characteristics. I shall never forget the day he had fat Mrs. Lacy imprisoned on your piazza. Wasn't it funny? I don't know how he ever let her waddle up your pathway, but there was one thing certain, he had no intention of letting her waddle back. I have often wondered why she was so short of breath and so purple about the neck. It must have been overexertion of the vocal cords, rather than overexertion of the pedal extremities. When we arrived it looked as if they had been having a heated discussion; there was nothing that resembled a peaceful prayer meeting then. Bozo's eye had a wicked look and his growl an ominous sound. Has she ever spoken to you since?

Margaret, I wouldn't condemn Bozo to a watery grave for that. Really, I would even admit that he was an excellent watch dog. However, the day he engaged in the fight

with Peter's collie dog does remain a nightmare. I can see the beautiful slick coat of "Lady" being scattered upon the winds, and blood flowed almost too freely to be attractive. I marvelled at the calm way in which the Peters accepted the situation. Was there any dog in the summer colony with whom Bozo didn't pick a fight? The people stood him with unusual patience, but I think it is just as well for both you and Mortimor that you returned this year minus the brute.

The day I really was terrorized was the morning he bit little Edith White. Whether done in play or not, it was bad business, and if her father had not been a doctor things might have turned out quite differently. He did threaten suit, did he not, but you and Mortimor were so sure that there would be no liability where you had not known the dog to bite before that I decided to let you enjoy your righteous state, for when "ignorance is bliss, it is folly to be wise." But now that Bozo is really quiet, let me tell you some law.

There was a time when every dog was entitled to one bite and every horse to one kick. Well, the horse, under certain circumstances, is still entitled to the kick, but the dog is no longer allowed his first bite. In fact, there is a statute which makes either the owner or keeper of a dog liable for double the amount of the damages, even though he has no knowledge that the dog has bitten before, and if by chance he has knowledge of a previous nip, he becomes liable for triple damages. When you think what might

come in the way of hospital bills, doctor's charges, and evaluation of suffering, the financial picture assumes rather large proportions if you triple the amount, or even double it.

I imagine that you are a bit glad that such a possibility is not yours this season. Of course, if an individual hectors and teases a dog and the animal bites, the owner has a defense against liability for he can set up the contributory negligence of the victim. Usually, however, teasing is done by a small boy and thus, the courts are liable to say that the boy really knew no better and that his acts can hardly constitute negligence, so he recovers.

Moral--don't own or keep a dog if you want peace of mind.

Devotedly yours,

General Laws (Ter. Ed.) Ch. 140, s. 155-159.
Maillet v. Mininno, 266 Mass. 86.

Animals, Wild and Domestic, at Home and Abroad

Dear Margaret,

This is a continuation of my letter of yesterday. One of the neighbors at home years ago drove his horse down to the store and left him in front of the post office. Old Man Schultz came along, head bent as usual. He always walked with his eyes fastened on his feet as if he were afraid they'd fail to travel on the straight and narrow path. As he got opposite the horse, what did the animal do but reach over and grab the old man by the shoulder. I don't think he hurt him much, but it certainly scared him out of a few years of life and the thing which probably infuriated him most were the loud "guffaws" of the usual morning group of loungers on the steps. He sued the owner, but he lost his case because the evidence revealed that the horse was where he had a right to be, and that Mr. Manley had never known of any vicious propensities. Had the horse bitten before to his owner's knowledge, he would have been liable, or if the horse had been trespassing, the owner would have been liable for both expected and unexpected acts, even though without knowledge of vicious tendencies. Of course, with the coming of automobiles this common law on domestic animals is rarely called into use, but there are still good cases in rural sections where cows break through and trample down corn fields. We ever have in New England the duty of fencing our domestic animals in.

Speaking of domestic animals makes me think of wild animals. Do you recall on the Middleboro road to the Cape the gasoline station where the bear was ever the center of attraction? I never got gas there because to me it seemed all wrong to keep a poor animal encaged in a small space to be the target for the wise remarks of unthinking automobilists who are bent ever on going somewhere, never mind where, as long as they are burning up distance. That bear proved expensive. One day, in madness I suppose, he bit the hand of an individual feeding him cheap candy which the man kept for sale for that purpose. Probably the poor beast had a toothache, or possibly a stomach ache because of too much of such fodder, but the court awarded the victim \$2000, for he who keeps a wild animal is an insurer that he will do no harm, therefore, he is liable without any proof of negligence. Don't buy Junior a monkey to console him for the loss of Bozo!

Do you recall the article which appeared in the newspapers in the early spring concerning the small youngster who was badly mutilated by the bear at Franklin Park? He had climbed over the first fence when the paw of the great creature reached him and pulled him against the bars. A tragic little story, but there could be no redress for two reasons. In the first place the boy's own negligence in climbing over the enclosure would bar recovery, and again, when animals are kept in zoos by municipal authorities there can be no recovery. It is nigh impossible to recover from

cities, for cities are sovereign bodies not to be sued without their consent and the places of consent are very few. In conducting zoos a city is considered as acting as an agent of the state and the state refuses to be liable for injuries.

Bozo's departure has given me opportunity for a long dissertation. Don't feel too heartbroken, remember you may have been saved an expensive law suit. Is this poor consolation?

Devotedly yours,

Dix v. Somerset Coal Company, 217 Mass. 146;
 Marble v. Ross, 124 Mass. 44;
 Bottcher v. Buck, 265 Mass. 4;
 Frasier v. Chapman, 256 Mass. 1;
 Goodwin v. Nelson, 239 Mass. 232.

The City is a Sovereign Body

Dear Annie,

I was very glad to hear your voice over the telephone last night, and glad to hear of you and your family once more.

The youngster concerning whom you asked really has no right to recover for an injury caused by the older boys playing tag in the school yard. Whom would you like to sue?

The city of Boston when conducting its school system is really acting as an agent of the state and sovereign bodies are not to be sued without their consent. I assure you that the opportunities to recover from a city granted by the Legislature are few and far between, and that is wise. Tax payers' money should only be used for public purposes and not to redress private wrongs. Individuals like to receive money, but as tax payers they object strenuously to increased tax rates. There have been many cases brought against the cities because of injuries on school premises due to defective conditions, carelessness on the parts of teachers and servants, but never has there been a recovery.

You asked me if the teachers on duty in the yard would not be responsible. I think not, Annie. It was an inevitable accident; boys will run and play. She could hardly be expected to control their every movement and to attempt to hold her responsible would seem to me unwise.

There is no one left but the boys themselves. Youngsters are liable for their own torts, but boys are not expected to use the care of an adult and I doubt if any court would consider them, under the circumstances, more careless than boys of their age would be expected to be. Even if they were found negligent what value would a judgment be? Parents are not responsible for the sins of their offspring, not liable for judgments obtained against them and the collection of such judgments would be a long and difficult task. Not an impossible one, but hardly a pleasant one.

I sympathize with you both. I think if the parents and the boys knew how seriously Allen was injured that they might feel a moral obligation to help bear the expense. Personally I believe results could be accomplished if the problem were approached from this angle.

Sincerely yours,

Murphy v. Hurley, 250 Mass. 582;
Hill v. Boston, 122 Mass. 344;
Kelley v. Boston, 186 Mass. 165;
Bolster v. Lawrence, 225 Mass. 387.

Why Charitable Corporations are not so Charitable.

Dear Miss Dexter,

Do you know that for a law student you surely showed poor judgment when you chose the stairs of the Home for Independent Living as the place upon which to fall and break your arm? Poor youngster, I am so sorry for the hurt, so sorry for the inconvenience that will be yours, and sorry also that you are learning law from the practical standpoint.

You ask me if it is true that even though your injury was caused by a defective brass edging on a common stairway that there is no liability.

This beautiful Home for Independent Living, Miss Dexter is listed in the State House as a Charitable Corporation. Do you know what that means? Evidently some one left money to establish for working girls congenial home surroundings, and the money paid in by the inmates really does not meet all of the expenses. In other words there are no profits to stockholders. The idea is fine and Boston has a number of such places where girls can live for nominal sums. The benefits of such an institution are many but there are some disadvantages. Because the law feels that the funds of such places should not be available to redress private wrongs they have established the non liability of charitable institutions for the torts of their servants and agents. It is a wise law but it frequently works for individuals a

hardship, as it is doing in your case. I wish I could help.

The law on this subject has been growing through the years. In an old case, McDonald v. Mass. General, a patient was injured while in the hospital and although they denied him recovery the court said by way of dictum (by that term I mean an expression of his opinion as to the law on hypothetical facts not established in the given case), that had the injury been due to the negligence of employees who had been carelessly selected by the trustees then there would be liability.

However in a later case, Roosen v. Peter Bent Brigham Hospital, liability was flatly denied regardless of any carelessness in the selection of the probationers, and today the law seems well settled on the non liability of charitable institutions regardless of whether one is an inmate of the institution, a patient, a person there on business or merely a pedestrian on the street who is struck by an article thrown out of the window by an attendant.

If a charitable corporation goes into work along a line wholly commercial then it loses its mantle of protection and becomes liable like any private person or organization. We have had a recent case involving Morgan Memorial. You know that they maintain their own workshops and then sell the renovated products. Selling is a venture primarily commercial and they were recently found liable where a person was injured because of a defective condition in one of the stores.

On the other hand if a charitable hospital causes injury to a paying patient there is no recovery because caring for the sick is charitable work whether with or without pay. And so in your case, theirs is a charitable purpose, the providing of wholesome home conditions for young women away from home at nominal figure. Hence, there can be from them no recovery.

This is all a fascinating subject, but to appreciate it one should not be an innocent victim. Frankly, Miss Dexter, you have no case. Sometimes I wish I knew the law less well for I have a feeling that lawyers with less knowledge and a goodly supply of plain brass often bulldoze people into settlements not particularly because they are interested in the client but because they need cash for their own selfish ends.

With little hope for you, and with deep sympathy,

McDonald v. Massachusetts General, 120 Mass. 432;
Roosen v. Peter Bent Brigham, 235 Mass. 66;
McKay v. Morgan Memorial, 272 Mass. 121;
Thornton v. Franklin Square House, 200 Mass. 465.

More about Charitable Corporations

Dear Mr. Alexander,

About the float! It is owned by the P. H. Improvement Association which I understand is incorporated under G. L. c. 180, and it is classified as a charitable corporation. You ask if the present sign, "Bathers use at their risk," would protect the association in case of injury. Frankly, the sign neither adds nor detracts from the liability, for charitable corporations are not liable for the injuries caused by the negligence of their servants or agents. If it were not there, there would be no liability, and with it there, there is still no liability. However, its psychological effect is good; its presence will satisfy some of the more fussy members and it will make the bathers a bit careful perhaps. By all means, let it remain.

Cordially yours,

Chapin v. Holyoke Y.M.C.A., 165 Mass. 280;
Holder v. Mass. Horticultural Soc., 211 Mass. 370.

Manufacturers and Their Responsibility.

Dear Miss Nash,

Thank you so much for the recent clipping. I will confess that the decision handed down by the Judge of the Federal District Court giving to the plaintiff a substantial judgment because of the burn received by her when the coffee urn melted, in her friends home, was a surprise to me. It is evident that the court classified the coffee urn as an article which is inherently dangerous, that is dangerous in and of itself, and I am afraid I should not have put it in that class.

Recent cases have enlarged the class of objects inherently dangerous a good bit, but this particular decision seems to open the door wider than ever. Manufacturers would be constantly tied up with litigation if every Tom, Dick, and Harry could successfully sue them in tort for injuries, real or imagined, caused by use of their products. In the last analysis the public would suffer for the simple reason that the bills would be handed on to the public as a part of the overhead charges. The cases have narrowed the liability of manufacturer to remote people down to two instances in case of injury and the action is of necessity one in tort because of lack of contractual relation between the parties. We find judgments against manufacturers because of negligence where they have placed upon the market articles which are dangerous in and of themselves. One

concern sold naptha under the name of kerosene. It was again sold incorrectly labelled and the resulting explosion caused serious injury to the plaintiff. He had no difficulty in recovering from the concern.

On the other hand a defective emery wheel found its way into the hands of a remote party who was injured because of the defective condition and he was denied recovery on the ground that emery wheels in and of themselves are not dangerous. I would have been inclined to put the coffee urn in the same class but the court must have found from the facts that all urns manufactured by the concern were carelessly manufactured so that they could not stand the degree of heat necessary for their ordinary use. On such a set of facts they would be inherently dangerous.

A very interesting case came down a year or so ago. Scrap film purchased from the Lasky Players was being carried in burlap bags by servants of the purchaser. The electric car was crowded and the bags were deposited by the radiator. Result? A terrific explosion, panic among the passengers and serious injury to several. They recovered from the Lasky concern on just the old principle. Here was a material dangerous in and of itself which they had negligently allowed to be taken from their premises without giving any warning as to its dangerous characteristics.

Manufacturers have also been held liable in tort where injury has come because of food prepared negligently by them for human consumption. There was the case in which

the individual bought canned spinach. It contained ground glass which hardly agreed with the consumer's alimentary canal. Inasmuch as the concern had handled the produce exclusively from the time it came from the field to the moment it was delivered to the purchaser the negligence must have been theirs and recovery permitted. Perhaps you will enjoy remembering and translating an old Latin phrase which often is applied in such cases, "Res ipsa loquitur" - "The thing speaks for itself" of negligence.

On the other hand there is the case where a man bought Quaker Oats for his horse. The Paris Green contained therein killed the animal, but the remote manufacturer was not liable. Here was food, negligently prepared, but it was not purchased for human consumption. The cases tried are many but success depends on the presence of these elements. The plaintiff, a stranger to the manufacturer, who would sue in tort, must prove that he consumed food for human consumption, negligently prepared, and that he was damaged as a result.

With these two cases the manufacturer's liability to others than those with whom he has had contractual relations ceases and if a judgment is to be obtained against him it must be that the article is injurious because of his wilfulness rather than his negligence as in the case where a plow which was imperfect in casting was deliberately painted over by the order of the manufacturer to conceal the defect. We have no hesitancy in placing responsibility for

injury upon such an individual.

Again, thank you for sending me the clipping. I am very glad to have it. I do not ordinarily see the Federal Reports and might have missed the case had you not so thoughtfully sent it to me. You see it was a case which had to be tried in the Federal rather than in the State court for it involved litigation between citizens of different states and that ever calls for Federal jurisdiction. The plaintiff comes from Ohio, she was injured by the melting of the urn in Rhode Island and the manufacturing company was located here. Had she been a Massachusetts woman the State court, rather than the Federal would have had jurisdiction.

Sincerely yours,

Farley v. Tower Co., 271 Mass. 230;
Guinan v. Lasky Players, 267 Mass. 501.

The Cause of the Cause and What Then?

Dear Leon,

This afternoon the bay has been like a mill pond, calm and serene. Do you recall the afternoon so many years ago when you tried to teach me to skip stones on the waters of Lake Winnepesaukee?

I have been indulging in that pastime for the past hour and been a bit fascinated by the ever widening circles. How they typify life. One event brings another, until a series of events are traceable to a single act, thoughtless or planned.

I see that situation so frequently in my work. Mr. Fuller decides to smoke out a skunk on Sunday morning and he puts a charge of dynamite into the hole. The next thing the entire village is aroused by the ringing of the church bell, announcing fire. The hole has another opening, the fire raced through the underground passage, fired the dry grass, spread to the buildings far down the road. So it went; and he was the cause of it all.

Jones left a revolver lying on the table. His small youngster picked it up, gave it to an older playmate and tonight Arnold Pratt has a bullet wound in the shoulder. Jones was the cause of it all.

At a bridge party several months ago, Mrs. X dropped the delicious bit of gossip that she had heard that young Pinkham in the bank had served a term in Atlanta

Penitentiary years ago. The story didn't stop there, it grew and grew and grew. The family was dropped, the youngsters shunned in the school, and young Pinkham advised to resign in the bank. He did and they have left town and Mrs. X was the cause of it all.

The law says there is responsibility on individuals who set in motion wrongful acts which acts in time set in motion other events until a chain of unfortunate circumstances may be traced to the careless, the thoughtless or deliberate act of a given wrong doer. The law is right, we who do the things should pay a price.

In reminiscent mood,

Metallic Casting v. Fitchburg R.R., 109 Mass. 277;
 Jacobs v. N.Y.N.H.&H., 212 Mass. 96;
 Carter v. Towne, 103 Mass. 507;
 Heaney v. Colonial Filling Station, 262 Mass. 338.

Mental Suffering as Damage

Dear Elsie,

Your problem reminds me of an old case in Massachusetts. A contractor was blasting negligently and a tremendous explosion occurred. Rocks and debris were hurled against the house occupied by Jane Allen and her sister Joan. The window in the sitting room was shattered and broken glass and flying fragments came into the room. Both sisters had been sitting by the table sewing and Jane, who was ever phlegmatic, was according to the case "frozen to the spot." She could not and did not move, but Joan, the younger, rushed toward the door. In her fright, she struck her shoulder against the door frame and bruised it quite badly. Neither sister was touched by the flying bits, but both were ill for several days following the explosion. Could either, or neither, or both recover from the contractor?

In Massachusetts, we do not grant recovery for fright alone which is caused by the negligence of another because people are constituted so differently that there could hardly be a common standard, but if there is physical contact with some outside substance recovery is allowed both for the physical and the mental suffering. Jane had no physical contact; her illness came wholly from fright. She was barred from recovery, but Joan, because she struck the door frame, could recover from the contractor both for the

physical and mental suffering.

You have a cause of action against the Elevated road. When the two cars came together in the Park Street subway, you were naturally much frightened, but the impact threw you against the seat in front and the necessary physical contact established. You say the chest and shoulder are still bruised and sore; you were fortunate to escape without more serious injuries. Your case will be taken care of speedily.

Sincerely,

Spade v. Lynn & Boston R.R., 168 Mass. 285;
Kisiel v. Holyoke St. Ry. Co., 240 Mass. 29;
Smith v. Postal Tel. Cable Co., 174 Mass. 576;
Conley v. United Drug Co., 218 Mass. 238.

The Principal and His Agent.

Dear Mr. Fulton,

I am sure that you need feel no anxiety over the outcome of that law suit. It is true that an employer is liable for the injuries caused by the tortious acts of his employees when they are acting within the scope of their employment and the law goes to the point of fixing liability upon him even if the acts of the employees were wilful as long as they were still about the master's business.

I am satisfied however, that in allowing the men to use the field adjacent to the factory for a recreation field that there was no carelessness upon your part and the fact that a fly ball during the noon hour activities went into the street and struck the plaintiff is not going to make you responsible. I even doubt if the man himself who struck the ball would be liable. It was an unfortunate strike, but, after all, a pure accident, and even the man in your employ is not responsible unless his act was negligent or that which is worse than negligence, deliberate. If he would not be responsible, neither would you under the circumstances. Even if he could be found to be negligent, and, so liable, you are not going to be liable. When engaged in playing ball the men were not acting within the scope of their employment, they were rather on an independent frolic of their own, and so you could not be liable merely because you are the employer. If you had authorized

the hitting of the ball into the street, or if you had allowed your men to make a nuisance of your premises, then you could be made responsible, but not on the facts as you present them.

Truly yours,

Harrington v. Border City, 240 Mass. 170.

For Those Who Toil.

Dear Mr. Williamson,

Shall you or shall you not insure your employees under the Workmen's Compensation Act? By all means insure. Of course I know you hate to have the expense but my experience is that employers who do not insure are pennies wise and pounds foolish. It doesn't seem to matter much that a factory is modern, even accident proof as it were, you'll always find accidents occurring and law suits looming up. If you are insured you know that the insurance company must shoulder the worry and you can forget the problem.

I recall how glad you were to recall that you carried automobile insurance the day you drove over the man's foot in Provincetown even though the fault was entirely his. I recall your saying at the time, "Look where the car is, but I bet there will be a dozen witnesses who will swear that I deliberately drove on the sidewalk." That is the story, cases are frequently won on the facts as they are made to appear at the trial rather than lost on the facts as they actually existed. It is a relief to have a professional worrying concern and that is exactly the role that your insurance company may play for you if you insure your workmen.

Then there is another side, you will have workmen incapacitated who are honest and whose needs are great. As long as their injury arose out of and in the course of their

employment they will be eligible for compensation and you are going to feel a sense of gladness in knowing that they will be taken care of. Insure not only for your peace of mind but for the sake of those whose happiness is more or less dependent upon you because from your concern comes their means of livelihood.

Truly yours,

Von Ette's Case, 223 Mass. 56;
Holmes' Case, 267 Mass. 307;
Collarullo's Case, 258 Mass. 521;
Silver's Case, 260 Mass. 222.

Your Duty to Your Guest

Dear Anne,

Please don't worry over the threatened litigation. I cannot see the slightest possibility of recovery for Mr. Danner. In the first place, there was no carelessness or negligence on your part and you do not insure people who ride in your car against the possibility of a tire blowing up.

Furthermore, I'm not so sure on the facts that Mr. Danner was even an invitee in your car, and if he were, Anne, you are not liable in Massachusetts except you are proven to be grossly negligent. To find a person grossly negligent the jury must be satisfied that no reasonable, prudent man would do what he has done under the circumstances; such conduct in their eyes would be inconceivable! For example, if you invited me to ride home from Boston as you so frequently have and then while at the wheel went to sleep and crashed into a telegraph pole and caused me injury, I have an idea I could recover real money from you if I myself had not indulged in a similar nap. The law in Massachusetts on this point has been well fixed since 1917, to a gratuitous invitee one is liable only on proof of gross negligence. A gratuitous invitee is one whom you ask to ride with you and who pays nothing for the service. Massachusetts feels that such an individual should not be able to make miserable the life of the one good enough to extend the courtesy unless such one

was greatly negligent. Massachusetts on the point is not in harmony with many of the states, so I always tell my students not to take their guests out of the Commonwealth if there is the slightest chance of their being found negligent, for the law of the place where the accident occurs governs. Therefore if you were in New Hampshire at the time of the injury, you would be liable to your guest if negligent, regardless of whether you were grossly negligent or not.

Personally, on the facts, as you have presented them, I doubt very much if Mr. Danner qualifies as an invitee. You told him you were driving to Williamstown on Tuesday. He asked if you had an extra seat, and knowing what a bore he is I imagine that it was with some reluctance that you admitted that you had. Did you express great pleasure at having accommodations and did you urge him to accompany you? If so, he was an invitee. If on the other hand, you told him the number in your party, and he asked as usual if you couldn't pack in his humble self, and assured you as usual that he'd not be the slightest trouble and would take up only the smallest space, etc., etc., I have heard him before, then I classify him legally as a licensee to whom you owed no duty except to refrain from wilful and wanton wrongdoing.

There is a difference, Anne, between negligence and wilfulness. We are often careless, without any intention, but wilfulness carries the thought of deliberateness. Did you, Anne, plan to have that tire go up just at the moment when Mr. Danner was leaning far out of the car to see what

he could see so that for a moment you would lose control of the machine and go into the wall, against which he was thrown with such force as to break his collar bone? Don't be ridiculous. Even if he were an invitee, which he was not, you are not liable for you were not negligent at all. If he were a licensee, you surely are not liable for you did nothing which was deliberate or intentional. Take heart and forget him. Be sorry for the expense to the machine and your own sprained wrist, and rejoice in the fact that he'll not again tell you how much he adores the country side and how he'd love it if you could tuck him in.

Sincerely,

Massaletti v. Fitzroy, 228 Mass. 487;
 Oppenheim v. Barken, 262 Mass. 281;
 Lytle v. Monteau, 248 Mass. 340.

The Family Car Doctrine.

Dear Evan:

You write asking me what is meant by the "Family Car Doctrine." In many states, if the head of a family has a car registered in his name he is always held responsible for any accident which occurs while the car is being used by any member of his family.

Massachusetts, however, has never recognized the "Family Car Doctrine," but there is a Statute which was passed in 1928 which provides that any person who operates a car is to be considered as the agent of the individual in whose name the car is registered. However, such a person may deny specifically the existence of the relationship, but if he does so deny, he has the burden of proving that there is no agent in the picture. If he does not so prove, then the individual operating the car will be considered as his agent, but it does not necessarily follow that merely because a person is my agent that I am liable for the tortious acts which he does.

In order for a principal to be liable for the torts of his agent or the master to be liable for the tortious acts of his servant, it is essential that not only the relationship exist but also that at the time of the accident the servant or agent be acting within the scope of his employment. Hence it follows that where a son, for example, is driving his father's car, the Statute would make him his

father's agent, but for his acts his father would not be liable unless the son at the time could be said to be acting under the authority of his parent.

A great many cases on this question come before our courts, and I imagine that in about fifty per cent of them the son is found to be acting within the scope of his employment. If, for example, the father kept the car for the use of his wife and instructed the son that whenever his mother desired he was to take her wherever she wished to go, then, under this set of facts, if the boy while driving the car for his mother was involved in an accident because of his negligence, I should feel that the father would be responsible. On the other hand, as so frequently happens, if the young people of the household take the family car for a joy ride of their own, and of course, take it surreptitiously, then, in our state no court could hold the father responsible.

I do not know what particular problem has presented itself to you but if I have not met your need let me know and I will try again.

Yours very truly,

Haskell v. Albiani, 245 Mass. 236;
Statute 1928, Ch. 317;
McNeil v. Powers, 266 Mass. 446.

When is Your Car Unregistered?

Alice Wilson Smith,

You are a foolish, foolish person. You cared enough for John Smith to marry him and his name is your legal name; whether you like it or not you are Mrs. John Smith and you should register your car in the name of Alice W. Smith and not in your maiden name of Alice Wilson. "Why all the excitement?" you ask. Because, young woman, after five years of married life you are driving an unregistered car on the highway, whether you know it or not, and that is a dangerous proposition. The mere fact that you have paid a registration fee and hold a certificate does not make your car of necessity registered.

John Taylor registered his Ford Touring car, then put a truck body on the chassis; and behold, he had an unregistered car.

Allen had a collision--a new engine was necessary; he travelled with his old papers--but his was an unregistered car--and so it goes. He who drives an unregistered car is a trespasser on the highway, an outlaw to whom no duty is owed except to refrain from wilful and wanton wrongdoing, and furthermore such an individual is an insurer and liable in case of an accident even though not himself negligent.

Let me paint pictures for you. You are late on a certain morning; unless you drive at a good pace John Smith will be late at the office. As you pass the foot of Pinckney

Street out shoots the car of Jones--and you two come together with injuries to the car and to persons both driving and riding.

Picture 1. Let us assume that there was negligence on the part of Jones and that you were guiltless. You cannot recover for injury to your car or to your person either from Jones or his insurance company. "Why not?" you immediately ask. Because you are a trespasser, an outlaw on the highway and for negligence alone Jones is not liable. To recover it would be necessary for you to prove that Jones wilfully and wantonly went forth to injure you. But that is not all. Mr. Smith cannot recover for his injuries because he knew or should have known that he was riding in an unregistered car.

Picture 2. It is impossible from the facts to find any negligence on the part of either you or Jones yet both cars are badly damaged, and all people more or less hurt. But this time you will pay for the damages to Jones' car, pay his doctor's bill plus, and likewise the expense of his guests in the machine. Why all this? Because, he who drives an unregistered car is also an insurer, and that means that he is liable for damages whether negligent or not. Not a pretty picture.

Picture 3. From this one alone you may get some comfort. Here both parties were careless, and neither can recover from the other for personal injuries or for damage done to the machine because you are both allowed to set up

the defense of contributory negligence and if you prove Jones's negligence he is barred from recovery. However, guests in the car of Jones would have an opportunity to recover from you because the negligence of the driver is not generally imputed to those who ride with him; but Mr. Smith would not hold as good a position in reference to Jones. Formerly everyone who rode in an unregistered car was likewise a trespasser but today he is not a trespasser unless he knew that the car was unregistered or should have known--and husbands are supposed to know how their wives are registering cars.

Take my advice and get your registration changed--forgive the "know-it-all" attitude, but I don't want to see you get into trouble.

Hastily,

Hanson v. Culton, 269 Mass. 471;
 McMahon v. Pearlman, 242 Mass. 367;
 Brown v. Alter, 251 Mass. 223;
 Nicholas v. Holyoke St. Ry. Co., 250 Mass. 86;
 O'Leary v. Fash, 245 Mass. 123.

the defense of contributory negligence and if you prove Jones's negligence he is barred from recovery. However, guests in the car of Jones would have an opportunity to recover from you because the negligence of the driver is not generally imputed to those who ride with him; but Mr. Smith would not hold as good a position in reference to Jones. Formerly everyone who rode in an unregistered car was liable as a trespasser but today he is not a trespasser unless he knew that the car was unregistered or should have known--and husbands are supposed to know how their wives are registering cars.

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Hastily,

Hanson v. Clifton, 365 Mass. 471;
McMahon v. Pearson, 365 Mass. 387;
Brown v. Alford, 361 Mass. 323;
Nicholas v. Holyoke St. Ry. Co., 350 Mass. 66;
O'Leary v. Frank, 365 Mass. 123.

About Negligence--and When Imputed

Dear Alice:

You wish I'd be a little less technical--I'm sorry my language was not wholly clear. You don't know what I mean by negligence being imputed?

Listen, my child, and I'll explain and then read my letter of July 22 again and if you don't understand, just do what I advised, namely have your car registered under the name of Smith and not Wilson.

A nurse-maid, the other day, took the small youngster out in the stroller. The house is located well upon a hill and at the corner the maid caught sight of the policeman on the beat. She let go of the handle, to talk with him for a moment, and somehow the youngster shifted his position, and the stroller went on a journey of its own, gaining momentum on the incline. An ice team turned the corner--the driver was paying no attention to where he was going, and the stroller crashed into the team, the youngster of a year and a half thrown out and badly injured. There was evidence of the negligence of the driver of the team, but no recovery for the child because the negligence of the nurse was imputed, carried over to the child, and for that reason his recovery barred. A child under three or four is considered too young to be either careful or careless and for that reason if another who has him in custody is careless, that person's negligence is imputed, we say, to the child, and he cannot

About Negligence--and When Imputed

Dear Alice:

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to be either careful or careless and for that reason if

another who has him in custody is careless, that person's

negligence is imputed, we say, to the child, and he cannot

recover. On the other hand, if a child is too young to exercise any degree of care, and there is no negligence on the part of those who stand in loco parentis, there is no reason why he cannot recover for an injury caused by the carelessness of another.

A mother had left a small child in the yard, with the gate securely fastened. She missed the child and he was found in the street badly injured by a passing truck. It seems that a neighbor's child attracted by the small youngster had stopped for a moment to play with him, and then gone its way leaving the gate unlatched. There, no negligence could be attributed to the mother so that there was none which could be imputed to the child and damages were allowed.

If a child has reached years of judgment and uses the care a child of its years would use, then it can recover for its injuries unless negligence on the part of those in loco parentis can be said to be the real cause of the injury. If such is the case, then no recovery is possible, for once more negligence is imputed. On the other hand, as sometimes happens, a child uses all the care that a prudent adult would use. Then the child is allowed to recover for his injuries caused by another's negligence regardless of any lack of care that might have existed on the part of parents or those in charge.

This doctrine of imputed negligence has also been discussed in reference to persons in cars and automobiles, and as a general rule it can be stated that the negligence of the

driver is not to be imputed to the rider; but that necessitates a finding that the rider was actively on the lookout for his own safety, and it is a favorite ruse of lawyers to endeavor, in cross examination, to trick the guest into an admission that he relied wholly on the skill of his driver, and had no thought for his own care. If he succeeds, as in the case when the woman admitted that she felt so secure that she went to sleep on the back seat, then her case against his client is immediately lost.

Enough for a dissertation on imputed negligence. If one can get at the facts the law is easy to apply. Mary, though seven years old, returned from the store with three-year old Tommy. In no uncertain terms she ordered him to remain on the steps until her return from the third floor apartment where she was to take the bottle of milk to her mother. Tommy didn't obey; he was found on the avenue run over by a street car. Negligence on the part of the motor-man was found and Tommy recovered for his injuries. Was the judgment right according to the law as I have stated it?

Sincerely,

Bullard v. Bos. Elev., 226 Mass. 262;
 Shultz v. Old Colony St. Ry. Co., 193 Mass. 309;
 Gibbons v. Williams, 135 Mass. 333;
 Travers v. Bos. Elev., 217 Mass. 188;
 Sullivan v. Chadwick, 236 Mass. 130.

What Do We Do About Nuisances?

Dear Bessie Grace,

I was much interested in your sister's problem in Leominster. Between your neighbor's hens and radios she is surely having a problem. Of course they constitute a private nuisance, an old French word which means "that which worketh harm." You ask me if she can do anything. The law permits one to abate a nuisance himself, but I will confess that the fact is easier stated than executed.

One man who knew that much law and had been incensed with the depredations caused by the neighbor's poultry in his garden, in desperation caught the lot one day, cut off their heads and arranged their remains neatly on his neighbor's front porch. The method was efficacious but the man learned some more law. Although one may abate a private nuisance, he has no right to take the life of trespassing animals except to prevent irreparable damage being committed; and the court didn't agree with the man that the hens were doing irreparable damage and merited such treatment. He had to pay their owner for their value.

I will tell you what Arlie did. Again hens worked havoc in the flower bed over which she had toiled so assiduously. Repeated requests to owners fell on deafened ears and still the hens came joyfully and destructively. Finally Arlie bought whole corn, soaked it several hours and then prepared neat little oak tags, "These hens have been

trespassing on the property of Leon Smith." A silk thread eight or nine inches long was fastened on one end to the tag and the other end was hitched to corn kernels and then the corn was broadcasted in the garden. Result? Very simple! The hens came, they saw, they swallowed, they went home dragging their tags after them. The results were gratifying for they came not again and Arlie felt infinitely rewarded for the time and patience needed to bring tags and silk and corn kernels together.

This device might help with the hens, but the radio isn't so easily handled. Doubtless it is a nuisance, but in order to abate it it looks as if your sister would have to adopt the "Carrie Nation" methods of other days and the picture is not so pleasing. Not only would she dislike the notoriety of going forth to destroy another's property, but in the process she would make herself liable as a trespasser and that would be to invite litigation and once the wheels of litigation start it is difficult to know just when they'll stop. I often tell clients that it doesn't matter whether they win or lose in our courts they lose in the long run anyway.

If circumstances make personal abatement inadvisable and the radio proposition would seem to come into that category one can of course seek an injunction against the offender in the court of equity, but there again one faces litigation and all its trouble. If your sister only lived in the city so that the wires were stretched over her roof as are our neighbors in S. Russell Street, she could perhaps get

temporary relief on some particularly maddening night by journeying to the roof and doing things up there. Legally all rights are on her side but the obtaining of those rights will involve some particular cleverness I'm thinking. I wish I could do better for you than I have, but I hope a half loaf may be more acceptable than none and I really recommend Arlie's treatment of the hens.

Sincerely,

Clark v. Kelliher, 107 Mass. 406;
Stodder v. Rosen Talking Machine, 241 Mass. 245;
Prest v. Ross, 245 Mass. 342.

A New Duty of Support

Dear Frances,

I went down to see the house today. It was a sorry sight. Solig and Blair had tied in the front wall. Huge planks attached to steel cables running from the front to the back of the house told all the community round about that something was quite wrong with that four-story brick wall.

Now I presume we settle down to a period of peaceful waiting. The wall at 29 has been condemned too, and inasmuch as that is not shored up, we dare not start to take down ours until they do.

You see, they can safely begin for although the walls are together, ours will not fall, but if we started on ours, theirs would be almost sure to go into the street. Then we would be liable to them in damages for in the City of Boston, by ordinance, property owners not only are liable for the lateral support of land but also liable for the support of adjacent buildings.

We are certainly having some unusual experiences. Who would ever have believed that such a good-looking wall could have moved out from two to four inches from the main house. I don't know what ever saved it from going into the street before this. I think we are most fortunate to have discovered it before the house was finished inside and we had moved in.

Devotedly,

Thurston v. Hancock, 12 Mass. 220;
Gilmore v. Driscoll, 122 Mass. 199.

SUMMARY IN TORTS

General Information

A. The tort and its essentials

I Definition: A tort is an act of commission or of omission by one without right whereby another receives some actionable injury to person, property, or reputation.

II Elements

1. Violation of a legal duty
2. Injury or damage resulting

B. The Liability of Parties

I Insane persons--liable for torts involving purely physical capacity.

II Infants--liable for all torts which they can physically commit and those involving a mental element if not of too tender years.

III Parent--not liable for torts of minors, unless act was committed in the presence of, and no steps were taken to interfere or prevent it, or minor was acting as the agent of the parent, or the parent was permitting the premises to be used as a nuisance.

IV Masters--liable for torts of servants when acting within the scope of the master's business whether wilful or not.

V Municipal corporations--liable in the following instances:

1. Injuries caused by defective highways.
2. Injuries caused from mob violence.
3. Injuries caused from the wrongful exclusion of children from the public schools.
4. Injuries caused from cases of continuing trespass (common law).
5. If there is pecuniary gain or production.
6. Liable for injuries caused by negligence in the construction or care of sewers but not liable when damage arises because of an inadequately planned system.

VI Charitable corporations--not liable for the torts of their employees causing either suffering or death, but if the property is used partly for charity and partly for private gain, then liability arises.

VII Manufacturers--liable to the entire world when wilful, wanton, or reckless, liable for negligence only to immediate vendee except in two instances when liable to sub-vendees.

1. If the article placed upon the market is one inherently dangerous to life.
2. Also liable to third persons because of negligence in the preparation of food for human consumption.

C. Extent of Liability

I Liability for proximate consequences.

1. Liability extends to all consequences which proximately flow from the defendant's wrongful act.
 - a. The act of a third person intervening will not

excuse the first wrongdoer if such act is either instinctive, impulsive or involuntary and one which could have been reasonably foreseen, but if the act was voluntary the line of causation is broken and the defendant's wrongful act too remote.

II Liability for intervening causes.

1. Where the line of causation is broken by a voluntary act such act becomes the intervening cause of the injury and the second wrongdoer is responsible.

III Liability for concurring causes.

1. The fact that the wrongful act of a third person concurs with the wrongful act of the defendant to produce the damage to the plaintiff does not in any way excuse the defendant; each is primarily liable for the full amount of the damage.

D. Defenses to Tort Actions.

I Necessity.

1. Defense of person--force may be met with reasonable force but unless in one's home life should not be taken until there has been retreat to the wall.
2. Defense of property--reasonable force appropriate to the end is excusable. In Massachusetts one may defend or regain his momentarily interrupted possession by use of reasonable force short of wounding or the employment of a dangerous weapon. If the possession is not momentarily interrupted the owner should apply to the law unless he can regain his possession peaceably or by strategy.

II Acts of State--in the exercise of police power or the right of eminent domain.

III Licenses by law--officer serving civil process may break inner door of a dwelling house, officer serving criminal process may break either outer or inner door, right to enter an inn or conveyance of a common carrier, right of landlord to go on the demised premises to prevent waste, right to go to collect debts, right to reclaim goods on the land of another, to leave the highway if it is impassable, right to trespass on the land of another to save life or property.

IV Illegal conduct or contributory negligence of the plaintiff.

1. The illegal conduct may be a condition and not a cause of the injury; hence, not a defense.
2. The defense of contributory negligence has been abolished by statute in Massachusetts in case of a:
 - a. Passenger killed on railroad or railway.
 - b. Person injured or killed at a railroad crossing where the road fails to give statutory signals unless the party was guilty of gross negligence or wilful misconduct and is also abolished by common law where the defendant acted wilfully and wantonly.
3. If a minor is suing for injuries to which the negligence of a parent or one in "loco Parentis" contributed, the

parent's negligence is imputed to the child and there is no recovery.

- a. Even if the parent was negligent, if his negligence did not contribute, the child can recover if
 - (1) the child was too young to exercise due care; or,
 - (2) if old enough to exercise care, he has exercised the care to be expected of children of his years.
- b. If the parent's negligence contributed the child might yet recover if he used the care of an ordinarily prudent adult, but otherwise not.

E. Injuries to Person

I Assault and Battery.

1. An assault is an attempt, real or apparent, to do bodily injury to the person of another within reach, while the battery is the consummation of the assault; namely, the unlawful touching of the person of another.

II False Imprisonment.

1. The total or substantial restraint of another's freedom of movement or liberty.
2. Either an officer or a private person may arrest without a warrant if a felony is being or has been committed, or if a misdemeanor is being committed.

III Malicious Prosecution.

1. To maintain a suit four elements must be proven:
 - a. A favorable termination of the prior suit.
 - b. Instituted with malice.
 - c. Without probable cause.
 - (1) The jury may infer malice as a matter of fact from lack of probable cause.
 - (2) If the former plaintiff (the now defendant) took the advice of an attorney after making to him full disclosure of all the facts he cannot be held liable in this action for by this method he establishes that he acted with probable cause.
 - d. To the damage of the now plaintiff.

F. Injury to Property.

I Trespass quare clausum fregit.

1. An interference with possession.
2. Justification for trespass.
 - a. Entry by express or implied consent of the owner.
 - b. Entry by license of law.
 - (1) One has an irrevocable license to go on the land of another to get his goods if they be there through no fault of his.

II Trespass de bonis asportatis.

1. An interference with possession, not an exercise of dominion.
2. Possession or right to possession is sufficient to

maintain action.

III Conversion.

1. The usurpation of dominion or ownership over the personal property of another.
 - a. It is not necessary that the plaintiff be the owner of the goods; a right of possession as against the defendant is enough, e.g. the right of a finder of lost articles, or the right of a bailee to maintain conversion.
 - b. If one commits a positive tortious act his innocence of good faith is, as a general rule, immaterial.
 - c. Demand and refusal are evidence merely of conversion, and need not be proved where conversion is established by a positive tortious act, as where the taking was wrongful in the first place.
 - (1) If the taking was rightful then to establish conversion there must be evidence of a demand and an absolute refusal.
 - d. The measure of damages is the value at the time of conversion plus interest.

G. Injury to Reputation.

I Slander and libel.

1. Slander is transitory defamation while libel is defamation in a permanent form.
2. The gist of the tort of either slander or libel lies in publication, i.e. the communication of the defamation to some person other than the plaintiff.
 - a. One who repeats a slander is liable for all the injury flowing from his repetition.
3. Truth is an absolute defense to an action of slander, regardless of the motives or malice of the defendant, but in action of libel truth is not a defense if the article has been published maliciously.
4. An absolute privilege is a defense in either case.
 - a. An absolute defense is confined to the officers of government in the three departments, and to publication of judicial proceedings.
5. If the defendant had an interest to protect or a duty to perform in publishing the defamatory matter, and acted in a reasonable manner, he will be prima facie privileged but malice will lose for him the privilege.

H. Miscellaneous Torts, affecting both persons, property and property rights.

I Negligence--the doing or omitting to do an act in violation of a legal duty or obligation due to the person sustaining the injury.

1. Since 1917 three degrees of negligence--gross, ordinary, slight.
2. Standards of duty owed the following people determine the degrees of negligence, if any, for which the defendant is liable.

- a. To trespassers there is no duty owed except to refrain from wilful and wanton wrongdoing.
 - b. Only a similar duty is owed to the licensee.
 - c. To an invitee a duty is owed coexistent with the extent of the invitation.
3. Unregistered automobiles are trespassers upon the highway, and the driver of an unregistered car is an insurer that the car will do no damage.
4. A gratuitous bailee is liable only for gross negligence.

II Damage by animals.

- 1. Wild animals--the owner is absolutely liable for damage without proof of negligence.
- 2. Domestic animals.
 - a. Trespassing on the plaintiff's property.
 - (1) Liable if the damage is such as is to be expected from the animal's nature.
 - (2) If domestic animals trespassing cause special damage because of vicious propensity the owner is liable whether he knew of the propensity or not.
 - b. If a domestic animal is where it has a right to be and causes damage the owner's liability turns on his knowledge of the animal's viciousness.
 - c. "The owner or keeper of a dog shall be liable in an action of tort to a person injured by it in double the amount of damages sustained by him." G. L. c. 140, s. 155. No longer is the dog entitled to one bite.

III Nuisance, "that which worketh harm."

- 1. A nuisance may be public or private, but for a public nuisance to be also private it must differ in kind rather than in degree.
 - a. An individual may abate a private nuisance but not public nuisance.
 - b. The legislature may legalize a public nuisance but not a private nuisance.
 - (1) Although one may abate private nuisances he must not kill animals which constitute a nuisance except they be doing irreparable harm.
- 2. Every man must so conduct his business as to cause minimum discomfort; the old doctrine that one must not go to a nuisance has little force today.

Arson of Yesterday and Today.

Dear Laura:

You will be much interested to know that the town is all excitement over the fact that poor Mr. Fuller burned down, one day last week, deliberately and intentionally, the little cottage on the lake. You will recall that he had always hated the place and that its memories were far from pleasant. For some time he has been living in the old house on the river road but whatever possessed him to deliberately destroy the cottage is beyond me. However the property was not insured and no one can say that he intended to burn it for the purpose of defrauding his insurance company, but some smart individual in town has discovered that there is a statute to the effect that if one burns even his own property he can be indicted for arson and Mr. Fuller is much afraid that he is going to spend the rest of his days in jail. Can you imagine people being mean enough to make the poor old man unhappy? I can hear you say, "That is ridiculous," but after all, Laura, it isn't ridiculous. If any one wanted to make a complaint to the Court it is really true that he could be convicted of arson today.

Formerly in order for a person to be liable for arson he had to wilfully and maliciously burn the dwelling house of another and he could not be guilty of arson if he burned his own building. For example, if a man had gone away for the summer and had left his servants in his house

and they burned his dwelling they would be liable for arson because it would still be the dwelling house of another. On the other hand if the house was occupied by a tenant and the tenant burned it he could not be convicted of arson because the tenant was the one who was in possession, hence it was his dwelling house which had been burned and not the dwelling house of another. It followed then that should the landlord burn the house he would be liable for arson because he would be burning the dwelling house of his tenant. The old common law was very exact in its requirements and the only time that a person would be indicted for arson if he burned a building other than an occupied dwelling house would be if he burned a church because the good people of the past considered the church the dwelling house of God. Today, by statute, liability for arson has been greatly increased and he who maliciously and wilfully burns either his own dwelling or the dwelling of another, occupied or unoccupied, may be convicted of arson and become a guest of the state for a period not exceeding twenty years.

Poor Mr. Fuller, he really has some cause for alarm, but I am assuring him that there isn't a District Attorney in the State who would not "nol pros" his case. You ask what I mean by that expression, I simply mean that under the circumstances I can not conceive of any Attorney for the State who would prosecute the case, but the old

man's life has certainly been made miserable. I'll write you later if further developments arise.

Hastily yours,

Com. v. Cooper, 264 Mass. 368;
General Laws (Ter. Ed.) Ch. 266, s. 1-10.

Larceny or Robbery

Dear June:

To hear your name broadcasted over the radio in the news flashes yesterday afternoon was decidedly surprising and you can believe that I was interested to read the report of the robbery in the morning paper. Of course I realize that the report is probably far from true and after the fright of it all has subsided a bit I shall be very glad to get your vision of the situation. For some time I have been surprised at your willingness to have so much money in your possession from week to week, and I have often wondered if you still had the courage, as of yore, to carry a couple of thousand dollars in a paper bag under your arm from the bank to the office, for the pay roll. I do hope that it may be possible for the men to be apprehended and for you to be able to identify them. I appreciate that you will not enjoy, during the coming weeks, being called to various jails to see if you can identify suspects, but our country is in a bad way and, although the duty will be distasteful, I know that you will go through with it.

The question was raised at the house last night whether or not the men, if apprehended, could be convicted of robbery and if not of what crime they might be found guilty. Robbery means the taking of personal property either with fear or violence from the person of another. The word person is used very broadly and if one gives up property under the emotion of fear, robbery will still exist even though it was

not taken from his person. Furthermore it does not follow that the property taken must be the property of the person from whom it is taken in order for robbery to arise. There is no question but the two men could be convicted of robbery, a crime which carries a maximum sentence of life imprisonment. When they ordered you to open the safe and again to open the cash register they were forcing you at the point of a gun to make it possible for them to get the money and the element of fear is certainly present even though no active violence was practiced upon you. Several weeks ago a woman was going down State Street and had an under-arm purse with her. A snatch-thief took it and ran, and the woman in question pursued. For a wonder she was a better runner than he was and she succeeded in getting hold of him long enough at least to enable others to come to her help. In a way that fellow can be grateful for under the circumstances he can not be convicted of robbery. Evidently she was not particularly afraid for had she been she would not have pursued him and furthermore there was not enough violence to constitute robbery. If violence is the element depended upon there must be some sign of real physical injury, for example, the tearing of the lobe of the ear when the earring was snatched or the spraining of the finger with the seizure of the ring.

I think you did, under the circumstances, remarkably well and I am exceedingly glad that although you opened the safe they did not, in their haste reach the several packages of money which you had secreted away. I'm also glad that the pay

roll at that particular moment reposed in the drawer of your desk and that they only got away with a small amount, namely that in the cash register, in comparison with what they might have gotten had they been more careful in their search.

Sincerely yours,

Com. v. Weiner, 255 Mass. 506;
General Laws (Ter. Ed.) Ch. 277, s.39.

Were the Goods Obtained by False Pretenses?

Dear Leon,

In the days of common law crimes, they spoke of larceny, of embezzlement and of obtaining goods by false pretenses. Today the three are placed under one heading--that of statutory larceny.

I still like to have students see the differences between them, to point out that in larceny the complainant had parted with neither title nor possession; in embezzlement, he had parted with possession but not title; while in the last crime, the complainant had, because of the false pretenses, given up, when he otherwise would not have so done, both title and possession.

You asked me if a concern would be criminally liable if by clever advertising it created a false market for ancient spark plugs and in that way unloaded a tremendous amount of undesirable merchandise. If the firm created an artificial demand by setting forth orders which were fictitious, I should say, yes. The crime is that of obtaining money by false pretenses.

There must be a representation of a material fact which is intended to deceive and which does deceive and which accomplished the desired result.

An occupant of a poor farm refused to work. He said he couldn't work because he didn't have shoes. The authorities bought him a pair and still he wouldn't work. Then they

had him arrested on the charge of getting shoes by false pretenses. He wasn't guilty. He didn't want the shoes; he merely wanted to escape work.

Think it over. We'll argue it some other day.
Your concern is a first-class crook.

Hastily,

Com. v. Quinn, 222 Mass. 514;
Com. v. Rich, 219 Mass. 440;
Com. v. Morrison, 252 Mass. 116;
General Laws (Ter. Ed.) Ch. 266, s.30.

CRIMINAL LAW SUMMARY

A crime is any act or omission which is forbidden by law to which a punishment is annexed and which the state prosecutes in its own name.

A. Classification of Crimes.

I Crimes mala in se--those which are wrong within themselves and which will cause an individual to be guilty of any crime arising therefrom.

Crimes mala prohibita--those crimes which are made so by statute. One is not guilty for the commission of a crime which grows out of such a crime.

II Treason--against the Commonwealth consists (1) in levying war against it, or (2) adhering to the enemies thereof, giving them aid and comfort. The punishment is life imprisonment.

Felony--any crime punishable by death, or imprisonment in the state prison.

Misdemeanors--all other crimes.

B. Elements of a Crime.

I The Criminal Intent. Except in cases of statutory crimes, there must be a criminal intent or such gross negligence as the law considers equivalent.

1. General criminal intent is the intent inferred from the doing of an unlawful or wrongful act on the theory that the defendant is presumed to have intended the natural consequences of his conduct.

2. Specific intent is the intent required in certain crimes, e. g. in burglary, the intent to commit a felony; also in larceny, the intent to permanently deprive the owner of possession.

3. The term "constructive intent" is used in such cases as the defendant is held criminally responsible for the unintended act when engaged in the commission of a crime which is malum in se; in such cases the intent to do the crime actually committed is supplied by proof of the intent to commit the crime intended.

II The Criminal Act. If a statute makes the doing of an act criminal no intent beyond the knowledge of what the defendant was doing need be alleged.

1. The Crime of Attempt, consists of an intent to do an act and the doing of an act which should apparently result in the accomplishment of the criminal intent.

a. Elements necessary,

(1) A specific intent,

(2) Performance of an act amounting to more than mere preparation which should bring about the result,

(3) Failure of accomplishment.

C. Defenses.

I Incapacity.

1. Infants

- a. Under 7 years, conclusively presumed incapable.
- b. Between 7 and 14, prima facie incapable.
- c. Over 14, prima facie capable.

2. Married Women.

- a. If an unlawful act is done by a wife in her husband's presence there is a prima facie presumption of coercion. The presumption does not apply in cases of treason, murder or perjury.

3. Insane Persons.

- (1) The right and wrong test--A person is insane so as to be incapable of committing a crime when he does not know the nature and quality of the act which he is to do and is unable to distinguish right and wrong.
- (2) Irresistible impulses--This test is accepted on the theory that a person has no will to resist.

4. Intoxicated Persons.

- a. Intoxication, no matter how great, is in general no defense to a crime, unless
 - (1) It is a case of involuntary drunkenness procured by stratagem or fraud, or
 - (2) Drunkenness amounting to delirium tremens, or
 - (3) Unless the crime requires specific intent.

D. Parties

I In Felonies there are principals in both first and second degrees, accessories before and after the fact.

- 1. Principals in the first degree--those who actually do the act.
- 2. Principals in the second degree--those who by previous arrangement, are in position to render personal aid if necessary.
- 3. An accessory before the fact is one who is not present at the place of the commission of the crime but merely procures, advises or hires it to be done. The punishment in the three convictions is the same. G. L. c. 274, s. 2.
- 4. An accessory after the fact is one who harbors, conceals, maintains or assists the principal felon, or accessory before the fact. Punishment is not more than seven years in the state prison. A husband, wife, parent, grandparent, child, grandchild, brother or sister, can not be an accessory after the fact. G. L. c. 274, s. 4.

II In Misdemeanors all are principals.

E. Offenses against the Person.

I Murder--the unlawful killing of a human being by a human being with malice aforethought.

- 1. Murder in the first degree consists in killing another with:
 - a. Deliberately premeditated malice aforethought; or
 - b. With extreme cruelty; or
 - c. In the commission of a crime punishable with life

imprisonment or greater.

2. Murder which does not fall within any of the above classes is murder in the second degree.
3. The person killed must be a person born and alive, and the victim must die within a year and a day or it is not murder.
4. Murder in the first degree is punished by death; in the second degree, by life imprisonment.

II Manslaughter--the unlawful killing of another without malice, justification or excuse.

1. Voluntary Manslaughter--done in heat of passion under great provocation with the intent to kill.
 - a. Words or gestures are not usually regarded as sufficient provocation.
2. Involuntary Manslaughter--arises in three instances when there was no intention to kill but death followed.
 - a. While doing an unlawful act, not one necessarily dangerous to life; or
 - b. While doing a lawful act with gross negligence; or
 - c. Because of omitting to act, such omission amounting to gross negligence.
3. For Manslaughter the punishment is not more than twenty years in the state prison.

F. Offenses against the Habitation.

I Arson--at common law the wilful and malicious burning of the dwelling house of another.

1. Any charring is sufficient, but a specific intent to burn is necessary.
2. Arson is an offense against possession, so the house must be actually or constructively occupied, and be the house of another.
3. Statutory arson now includes the burning of any class of buildings, whether belonging to another or not, and includes the burning of bridges, ships, dams, etc.
G. L. c.

II Burglary--at common law, the breaking and entering of the dwelling house of another in the night time with the intent to commit a felony.

1. Breaking means the use of any unusual passage, or the entering by force, or obtaining entrance by fraud.
2. Entering is effected when any portion of the criminal's body or tools enters the house for other purpose than the breaking, namely, to commit the felony.
3. Night time is from one hour after sunset to one hour before sunrise.
4. Statutory burglary now includes the breaking and entering of any dwelling house in the day time, or entering in the night time without the breaking.

G. Offenses against Property.

I Larceny--at common law, the felonious taking by a trespasser and carrying away the goods of another without his consent

and with the intent to permanently deprive the owner of his property and to convert it to the taker's own use. By statute, larceny includes all forms of larceny, criminal embezzlement, and obtaining property by false pretenses.

II Embezzlement--the fraudulent appropriation of another's property by a person to whom it has been lawfully given.

1. Larceny without trespass--there must be a taking, an asportation of the goods of another with intent to steal.

III False Pretenses--if the owner parts with both possession and title under false inducement, the defendant is guilty of getting goods by false pretenses at common law.

1. Essentials of the Crime:

- a. The pretense must be made with intent to defraud and obtain property.
- b. Actual fraud must be committed either by use of a false token or a false statement of fact.
- c. The pretense must have induced parting with the property.

IV Receiving Stolen Goods--To be guilty the defendant must know that the goods he received were stolen. G. L. c. 266, s. 60.

H. Other Crimes.

I Forgery--the fraudulent making of a writing which if genuine might be of legal efficacy; or the fraudulent alteration of a writing so as to materially change its effect.

II Perjury--the wilful giving under oath, in a judicial proceeding, of false testimony material to the issue, or of testimony which is required to be given under oath.

III Conspiracy--the confederating of two or more persons to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means.

F Letters Centering about the Home and Its Sacred Relations.

I Husband and wife.

II Parent and child.

III Domestic Relations summarized.

The Court of Love

Brief for Respondents.

Statement

That in the month of May,
On or about some day
Appellant took relator's heart, and
stole it quite away.

Point 1

The case is more than clear
Intent doth well appear
"Felonious taking" please the Court,
is quite established here.

Point 2

The heart was not returned;
Appellant claims 'twas spurned,
The evidence, however, shows, with
passion it was burned!

Point 3

The larceny is grand
And, as the cases stand
Appellant, to relator clearly for-
feiting her hand,

Should be confined for life
In bonds of "wedded strife,"
And be proclaimed to all the world
as the relator's wife.

Dan Cupid, of Counsel
William Bard McVickar

Domicile and All That It Means

Dear Frances,

Frankly, I am not at all sure of my domicile though I know that I have one. After one becomes of age, she may take a domicile of her own if she so chooses, but I have never intentionally done so. For years, when I was shifting from place to place, it was a comfort to feel that I had a permanent home in a little quiet town on the Cape and I would have had no hesitancy in saying that I was domiciled in Plymouth County.

Today, frankly, I fear the court would find me domiciled in Suffolk County. Here is my place of business; here, I own property; here, I pay taxes; and recently I have voted here. I am afraid I have returned to take up my domicile in the city of my birth and in which, I was domiciled until the home people moved to the Cape twenty odd years ago.

The child has the domicile of its father until it can, at maturity, take a domicile of choice. If the father dies and the mother takes a new domicile, the child's domicile follows the mother's but not if she marries again.

A married woman takes the domicile of her husband and as his changes so does hers, except in one case--she may take a separate domicile for the purpose of divorce.

To have a new domicile, one must have both the intent and the physical presence in the new place.

The subject is one of importance. Your will is

probated in the domicile, your personal property is taxed at the place of the domicile, a child is legitimate or illegitimate according to the laws of the father's domicile, the divorce is good or no good according to the laws of the matrimonial domicile.

A man came over from Turkey intending to save money and to return to Turkey where he had left his wife, a Christian girl. After a time, he learned that she had renounced her Christianity, and had married a Moslem. According to the Mohammedan law, that was enough to constitute a divorce. He decided then to remain here. He married without telling the story of his life. His wife learned the facts and asked to have her marriage annulled on the ground that he was already married. No, his domicile was Turkey; there, he was a single man after his wife's renunciation of the Christian faith and her marriage. If he was a single man there, he was likewise single here and the marriage was valid.

Where is your domicile?

With love,

Kapigian v. Minassian, 212 Mass. 412;
Winans v. Winans, 205 Mass. 388;
Irving v. Ford, 183 Mass. 448.

Marriages, Valid, Voidable and Void

Dear Mrs. Grant,

Esther was seventeen when she married Jim Murphy. You can't talk in terms of that marriage being void or voidable. It is absolutely valid and nothing that you or Mr. Grant can do will set it aside. Jim Murphy may not be the man of your choice, but at least be thankful that he is a good, clean lad and give them a chance to work their way out of the situation. The time may come when you may rejoice in their happiness.

There are very few marriages in our state that are void, and by that I mean, without any standing. If the girl were below twelve or the boy below fourteen then the marriage would be declared void. It is true that if a clergyman performs the ceremony with knowledge that the girl is below eighteen, or the man, twenty-one, he will be liable to a fine unless the parents' consent has been given. But here Esther lied about her age, and Jim is twenty-two.

A marriage is also void where the parties are incapable of understanding the marriage relation, but even then it has to be set aside by a court decree during their lifetime; otherwise it is treated as valid.

The law also prohibits one from marrying within the third degree of kinship. I understand that frequently a man of the Jewish faith marries his niece, but that is against our law.

Once in a while a marriage is voidable and a decree of nullity can be obtained, but it is most unusual--and it is never granted except in cases of fraud which goes to the very essentials of the marriage relationship.

Mrs. Grant, you'll have to let Esther and Jim work out their own salvation or destruction. Neither of you can set their marriage aside and if it is ever broken it will be via the divorce courts for one of the seven causes which our state recognizes.

Let's hope that that day will not come.

Sincerely and sympathetically,

General Laws (Ter. Ed.) Ch. 207, 2.1-7;
Com. v. Ashley, 248 Mass. 259;
Randlett v. Rice, 141 Mass. 385;
Parton v. Horvey, 11 Gray 119.

When a Wife is Entitled to Support by her Husband

Dear Laura,

The trial is all over and the jury returned a verdict for Edgar. The poor old man doesn't have to lose his home to pay for the expenses of his wife's long last illness and death. Edgar was petrified and he had great difficulty on the stand in getting the lawyer's questions, but all unconsciously he won his own case.

The plaintiff's attorney had built up a beautiful case with Annie's ma and Annie's pa, and Annie's sister and Annie's brother-in-law. Each and every one had testified in great detail to a home coming one hot afternoon in July, for were they not all with Annie on that momentous day--that day when weak and silly Annie no longer enamoured had returned to the old roof as a dutiful wife should do. They testified to finding Edgar raking hay in the front yard, to tear-stained and loving Annie getting out of the car and tugging her heavy suit case with her, and of Annie placing the suit case on the ground and going up to Edgar and saying, "Edgar, I've come home to stay." There was no lack of harmony in their stories. They all agreed on the hay, the Ford car, the position of Edgar, the words of Annie, and the mute testimony of a suit case, evidence of real repentance; and they all agreed that he would have her not.

It was during cross-examination that Edgar won his case. The opposing attorney had stressed the July day, the hay, the driving in of the Ford, and to all Edgar had given a

scared consent. Then came the attorney's telling point "And Annie got out of the car with her suit case?"

"Hey," said Edgar.

"And Annie got out with her suit case?"

"Her what?" says Edgar.

"Suit case," thundered the attorney.

"Lord no," says Edgar, "she never had one."

And that moment it was all over. The picture of a repentant wife returning home and being coldly thrust out was gone.

It is true that a man must support his wife at home or abroad unless she is away from him because of no fault of his but if she leaves him of her own volition because other fields seem more attractive she cannot expect support nor can those who do support her collect from the husband.

There was no question but Annie went away of her own volition but the plaintiff had hoped to establish that it was the fault of the poor old man that she stayed away until return was too late. Evidently the jury did not agree with them for they brought in a verdict for the defendant and once more Edgar putters about the old house secure in the knowledge that he has a roof over his head. I was sorry for the old people for they could illy afford the expense which had been theirs. I was glad for Edgar; and I know you'll be too, for I remember that you talked a lot with him the year you spent in town.

Sincerely,

Sturbridge v. Franklin, 133 Mass. 503.

The Rights of The Adopted Child

Dear Frances,

I was much interested in calling with you on "Cousin Josephine" last week and in meeting Sylvia. What a marvellous woman Miss Valentine is. Her ninety odd years sit lightly on her shoulders--I could not realize that that tall, aristocratic, splendid woman had lived so long beyond her three score years and ten. The devotion between the older and the younger woman was very beautiful. Little did Miss Valentine realize thirty years ago when she took five-year-old harum scarum Sylvia into her heart and home that the day would come when Sylvia would be to her a tower of strength. I was glad to hear her say that all she had would be Sylvia's.

I wonder where you got the idea that children were only adopted by married people. Any one may adopt any person younger than himself and such adopted person has the rights of a natural born child as far as the adopting parents's property is concerned. Sylvia will take all of Miss Valentine's estate upon her decease if she passes out without a will.

Thank you for taking me with you.

Devotedly,

Ross v. Ross, 129 Mass. 243;
Gallagher v. Sullivan, 251 Mass. 552.

If Not Adopted, What Then?

Frances dear,

Of course I remember "Cousin Josephine" and Sylvia and I was sorry to hear of her passing and more than surprised to learn that Sylvia had never been legally adopted. It is indeed fortunate for Sylvia that Miss Valentine left a will otherwise she would have found herself penniless as far as Miss Valentine's property was concerned. There is still one unfortunate thing of which Sylvia probably has not yet thought, and that is the inheritance tax. If she had been legally adopted she would inherit the \$10,000 exempt from taxation but now she takes under the will as any other stranger and will be obliged to pay the state the inheritance tax which will amount to several hundred dollars. All very nice for the government but not as nice for Sylvia.

How unfortunate that Miss Valentine did not adopt her even in these recent years. Any single person, as I wrote you before may adopt a person younger than himself. If married people are to adopt it must be with the consent of both husband and wife. The procedure in the Probate Court is very simple.

An adopted child inherits in the same way as a natural born child from the adopting persons and from their lineal descendants but does not take from their lineal or collateral ancestors. For example had Sylvia been adopted by Miss Valentine and she had died without a will Sylvia would have taken all her property but had Miss Valentine's brother died intestate Sylvia

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would not be considered as a niece and could not take as an heir of his. Had Sylvia been adopted by a married couple and they had had children she would take from them as a sister. Sometimes we say that an adopted child has a double inheritance for she always takes from her own family as well as from the adopting person or persons. Certainly Sylvia deserved to be adopted. Financially for her it means only the loss of several hundred dollars but if there had been no will it would have meant a crushing blow. Why is it that people who are so finely educated are often so ignorant on these every day matters.

All love,

Davis v. McGraw, 206 Mass. 294;
Phillips v. Chase, 203 Mass. 556.

DOMESTIC RELATIONS

A. Domicil--the place where one either actually or constructively has his permanent home.

I Three kinds of domicil: the domicil of origin; the domicil of choice; constructive domicil.

1. No person is ever without some domicil. Each retains his domicil of origin until he acquires a new one.
2. No person has more than one domicil at a time.
3. To change a domicil there must have been physical presence in the new domicil and intent to remain permanently.
 - a. The expression of intent and the physical change need not come together.

II Evidence admissible to prove domicil: residence; place of business; presence of one's family; assessment and payment of taxes; exercise of the right to vote.

B. Void Marriages.

I Statutory Provisions.

1. Consanguinity and affinity. Marriage between those related by blood or affinity within the third degree is prohibited.

2. Polygamous marriage.

G. L. 207, s. 4. A marriage contracted while either party thereto has a former wife or husband living is void.

3. Mental incapacity.

Must be so great as to prevent a general understanding of the nature of marriage.

4. Insufficient age.

No person is capable of contracting a valid marriage until he or she has reached the age of consent (14 for males and 12 for females). Statutory age is 21 for males and 18 for females.

C. Divorce.

I Seven Causes for Divorce.

1. Adultery.

Voluntary intercourse of a married person with one not the husband or wife.

2. Cruel and abusive treatment.

Massachusetts has adopted the phrase "cruel and abusive treatment." Cruelty is defined as such wilful misconduct "as shall cause injury to the life, limb or health, or create a danger of such injury, or a reasonable apprehension of such danger."

Massachusetts applies the test of the effect of the acts and not their character.

3. Desertion.

The voluntary separation of one spouse from the other without the other's consent or justifying fault, intended to be permanent and continuing for the statutory period of three years.

4. Gross and Confirmed Habits of Intoxication.

Drunkenness to constitute a ground for divorce must be gross and confirmed and continue long enough to

render living together intolerable, and the habit must exist at the time of the filing of the libel.

5. Neglect to Provide.

By statute the neglect must be gross, wanton and cruel. No divorce if the wife fairly provides for herself by her own labor.

- a. The one libel which can be brought only by the wife.

6. Imprisonment.

Ground if in a Massachusetts prison, jail, or house of correction for a term of five years or more.

7. Impotency.

Cause by statute in Massachusetts if the condition existed at the time of the marriage unknown to the libellant.

II Defenses to a Divorce Action.

1. Connivance.

The corrupt consenting by one spouse to an offense by the other.

- a. Connivance implies more than mere consent, desire, intent; it involves action which facilitates the commission of the act.

2. Condonation.

The forgiveness of a marital offense which constitutes a ground for divorce.

- a. Always on the condition that the wrongdoer shall not again commit the offense. If the condition is broken the original offense revives as a ground for divorce.

3. Recrimination.

A counter charge in a divorce suit to the effect that the one seeking the divorce has been guilty of an offense constituting a ground for divorce.

- a. It is immaterial whether the offense was committed before or after the offense charged in the libel.

4. Provocation.

Where the conduct of the person bringing the action contributed to or caused the wrongful act complained of, though the conduct was not of such a character that a divorce could be obtained because of it.

- a. Probably used in Massachusetts only in cases of desertion or cruel and abusive treatment.

5. Collusion.

Any agreement between husband and wife to obtain a divorce by an imposition on the court.

- a. Effected by suppression of the facts, or by introduction of false or fabricated testimony.
- b. Although it must be specially pleaded it may be pleaded through amendment because it frequently takes place after the case has started.

6. Insanity.

If the guilty person was insane at the time the act complained of was committed, no divorce could be granted.

G Letters to Those Who Travel.

I The Common Carrier and His Problems.

II Inns of yesterday and today.

III Outline again.

Actua Dei nemini facit injuriam

Failure of performance when the Act of God's
the cause,
Is pardoned, where the duty's one required
by the laws,
But the Act of God though rendering impossible
an act,
Does not excuse the maker of an absolute
contract.

Latin Maxims
Foster

With Aeroplanes

Dear Allen,

The experience through which you have just been suggests to me that new law is in the process of the making, and I am not sure how the cases will be decided in the future, but I should imagine that the time would come when aeroplanes would be classed with railroad trains and electric cars as common carriers. When that time comes to pass the Colonial Aeroplane Corporation will find itself in the position of an insurer.

By an insurer I mean one who is liable although apparently without any negligence. The common carrier of olden days was in a position where he could very easily defraud the public. If goods were placed in his hands for delivery to some distant point he was transporting those goods over roads infested with robbers and if the transportation was not interrupted by such individuals, it was always within the common carrier's power to create a few for himself and when he reported loss to his patron, the patron was quite without evidence to prove his words untrue for the only witnesses that the patron could get would be men in the employ of the carrier and because they valued their positions they would hardly reveal any wrongdoing on the part of the transporting company. For that reason it was found necessary to place a very heavy burden upon the carrier and he became in the eyes of the world an insurer of all goods entrusted to his care

and therefore if the goods were not produced in good season he would be liable for the lost articles. Gradually he was permitted to set up four defenses and thus escape his insurer's liability. If the goods were lost because of an act of God, because of the fault of the shipper, or the inherent vice of the goods, or because of the capture by a public enemy, then he was excused from responsibility. If one reads the cases one is impressed that many things are blamed to God for which He is hardly responsible, but an act of God may be said to be any force over which man has no control, therefore a fire caused by a flash of lightening, a sudden freeze, a calming of the breeze, a tornado, a flood, might be reason for the carrier to escape responsibility. Again if the shipper himself were at fault if he packed the goods in such a way as to cause deterioration or if he were unwilling to pay the necessary refrigeration charges, he could hardly be in a position to hold the carrier liable. If the goods were being transported from one country to another when a state of war existed, and were seized by belligerent forces, the carrier was excused as he was if goods were destroyed because of their inherent characteristics, the tendency of fruit to decay, a frightened animal may injure itself by kicking, and under such circumstances if there is no blame to be attached to the carrier there should be no responsibility. Outside of these four places, however, the common carrier's insurance liability was established for years and it still exists to this day unless it is cut down by some special contract

between the carrying company and the individual using their service.

Your predicament is an unfortunate one. You tell me that you were going over to New York on the Colonial Line and that the aeroplane apparently left the field successfully that in a few moments something seemed to be wrong with the engine and that the pilot was finally obliged to take a nose-dive into the harbor and that as a result your baggage went overboard. Your only opportunity to recover from the aeroplane company if the aeroplane company is not a common carrier, and I am well satisfied that it is not at this time, would be to prove negligence, and it looks to me as if you would have much difficulty in establishing negligence under the circumstances. Traveling by aeroplane is very delightful but it does not yet give to one the security which you can feel when traveling by railroad or railway and until such time as the aeroplane companies are classified as common carriers one must realize that they will be liable for loss only upon proof of negligence.

Sincerely yours,

Wilson v. Colonial Airport, 278 Mass. 420.

All About Freight and Baggage.

Dear Leon,

You ask me to write you further concerning the insurance liability of common carriers--what it is, to what it extends, and when it extends, and so on. As I understand the law, the common carrier is an insurer of freight from the moment it comes into his possession for immediate transportation and this insurance liability continues until the goods reach the point of destination. Possibly it continues beyond that time, depending upon custom and the contract between the parties. When I say freight I am referring to any goods which are shipped for the purpose of transportation and for which service pay is given.

The insurance liability also attaches to baggage which an individual has for the purposes of the journey and which he has entrusted to the care of the company. It is rather interesting to note the articles which have been considered as fit for the journey. There is the tragic case of the woman who had come from the other country and had brought with her as her most treasured possession a feather bed, and when she reached her destination in the middle West, unfortunately it was missing. The feather bed was not considered as an article fit for the journey and was not therefore baggage, and if it was not baggage the company was not liable except upon proof of negligence and no negligence was established. The question has some times arisen

concerning money in one's trunk. If that money was taken with the expectancy that it would be used upon the journey then up to a reasonable sum it would be recoverable. What would constitute a reasonable sum is of course a question for the jury, but an amount as large as \$300 has in the past been allowed. I recall a case in which an individual testified that he had started out with \$800 in his trunk but he revealed the fact that the \$800 was intended to set himself up in business in the distant city and so he lost out because it could not be classified as baggage.

If you keep your suit case with you it is then under your control and there is no insurance liability whatever upon the road. They would only be responsible in case of loss if negligence could be shown. I recall the case of the man who left his valise by his seat and went into the smoking car. Upon his return some hours later the valise was missing but he could hardly recover from the road for his own negligence was most apparent.

Truly yours,

Levins v. N.Y.N.H.&H.R.R., 183 Mass. 175;
 Dunlap v. International Co., 98 Mass. 371;
 Kinsley v. Lake Shore R.R., 125 Mass. 54;
 Alling v. B. & M. R.R., 126 Mass. 121.

Cutting Down Insurer's Liability

Dear Leon,

Charles Clark returned from abroad a few weeks ago on the Cunard line and when he landed in the United States his trunks were missing. At first he was quite undisturbed. Were not common carriers insurers of baggage, liable for its loss without proof of negligence? I told him yes, but that today carriers were able, because of lower rates offered, to cut down their liability greatly, and we would need to know his contract.

He bought his ticket in Liverpool--and there the contract was made, and today I learned that that ticket on the reverse side states that there will be no liability on the company for loss of baggage from any cause whatsoever. England allows its common carriers to exempt themselves from liability even upon proof of negligence and English law governs his case.

Here a common carrier can cut down his liability, but he cannot escape all liability where he has been negligent.

Charles Clark is furious. He says he never read the stipulation. That fact helps his case not at all, for on the front of the ticket is the word "over," suggesting material of value on the reverse side and he is chargeable with it.

Life is not so simple after all.

Sincerely,

Forseca v. Cunard Steamship Co., supra.

The Passenger Identified and Pigeon-holed

Dear Leon,

You ask me when an individual is a passenger and when he is not a passenger! I do not wonder that you become confused. Let me endeavor to give you a number of situations in which one would really be a passenger and as such entitled to the very highest degree of care. You tell me that at the time of the accident you were about to board a car and that you were struck by a projecting trolley. Unfortunately you had not placed your foot upon the step or your hand upon the rail, and I fear that you cannot be classified as a passenger and that you cannot recover from the elevated road. The negligence which you would establish, if you could establish any, would be slight and as an individual waiting for a street car the road would be liable to you only on proof of ordinary negligence--a degree of negligence more serious than slight negligence.

One is not a passenger while waiting at a post for a car or while transferring from one car to another upon the highway, but one is a passenger if he is in the subway waiting for a train. Likewise, one is a passenger if he is in a station waiting for a train. However, one is not a passenger while in the South Station until such time as he stands upon the platform adjacent to the rail upon which his train goes out. This is because the South Station is owned by a Holding Company and serves more than one railroad line. One may be

a passenger while standing upon a rear platform of a train but one is not a passenger if he boards a moving train until he reaches a place of safety. One is not a passenger if traveling upon a free pass, but an employee who is allowed passes over the road will be justified in believing that such passes are a part of his compensation and that therefore he is not traveling gratis, he is a passenger.

The street car companies and railroad companies owe to passengers the highest degree of care and for that reason, although they are not insurers, they are liable upon proof of the slightest negligence. You have always been told that a master is liable for the torts or wrongdoings of his servant committed within the scope of his employment, but when I talk of common carriers to my students I remind them that the word "scope" is not broad enough and such carriers may be liable for torts committed within the course of their employment.

There is a case which will help you to remember this point. It occurred on the Needham line some years ago when there was only one set of tracks with the various necessary turnouts. One day the conductor had picked up a dead hen and, in a spirit of mischief, as he passed the other car on the turnout he threw it at the conductor on the out-going car. Unfortunately his aim was poor and the dead hen hit the lady passenger instead. You can imagine her ire and also her discomfort. It would be most difficult to say that the conductor was acting within the scope of his employment, that is, about his master's business, but notwithstanding that

fact the street railway company was liable because he was still within the course of his employment, he was still aboard the inbound car.

You have taken a very sensible view of the matter; under the circumstances you would really be foolish to attempt to recover from the company. Technically you were not a passenger and the best thing to do is to forget the injury as speedily as possible and think of pleasanter things.

Honestly, though perhaps disappointedly, yours,

Bilodeau v. Fitchburg St. Ry., 236 Mass. 526;
Deagle v. N.Y.N.H.&H.R.R., 217 Mass. 23;
Fraiser v. N.Y.N.H.&H.R.R., 180 Mass. 427.

Common Law and Statutory Liability of Innkeepers

Dear Laura:

Last week I stopped at the Fillebrown House in Kingston. I had not been there for more than ten years, but the atmosphere of the place fascinated me. I thought of the days when it was an old inn, for it dates back into the early 1700's. The huge fireplace in the dining room will take a five-foot log and you can stand inside of it and look up through the immense chimney to the sky above. In imagination I saw the old tavern again, saw the horses in the ancient stable, saw the travelers put up for the night enroute from Providence to Boston. What fascinating stories of other days could be told by some of these ancient houses.

I imagine that there was a bar in that old dining room and that many a weary guest was refreshed by food and drink, and then found himself, sleeping the sleep of the just, in one of the many upstairs rooms. Do you realize that the innkeepers in the olden days were like common carriers, insurers of the possessions of their guests as long as those guests were travelers?

Remember that a traveler was interpreted to be an individual who received both food and shelter in an inn and if his possessions were taken from the room during the night and while he was asleep the innkeeper was forced to make good even though he was in no wise responsible for the loss, but this was only true if the guest was a traveler. We have some

interesting cases deciding persons to be or not to be travelers. The man whose wife was not very well, and who moved with his family to the village inn for the winter, was not so classified and for loss of his possessions recovery could only be had on proof of negligence. On the other hand the army officer who with his wife remained in the hotel until such time as orders should come for a change, did qualify as a traveler.

Once again we are hearing about taverns and inns, but the ancient day is gone forever. They may now shelter noisy groups who are seeking new thrills and new methods of excitement but their times of dignity and genuine use are practically over. The fast train and the automobile have destroyed their need.

By statute, today, innkeepers are no longer insurers and if while in the hotel one's valuables disappear while under his control the maximum amount which he may recover from the proprietor will be but \$300 unless he had placed those valuables in the hotel safe. If so, then he might recover as much as \$3,000. Again we find that by statute if the loss has been due to a fire or armed forces that the common carrier liability even to \$300 does not exist except upon proof of negligence. These changes have come with improved methods of transportation; the need is no longer as great and so it follows that the responsibility is also lessened.

You who travel so widely--north, east, south, and

west--may sometime think on these things on your journeys.

To me they make life more fascinating!

Devotedly yours,

Hall v. Pike, 100 Mass. 495;
 Spring v. Hager, 145 Mass. 186;
 Frewen v. Page, 238 Mass. 497.

COMMON CARRIERS

A. Common Carrier Law.

I The common carrier and his calling.

1. A common carrier is one who undertakes for the public generally to transport goods or passengers from place to place for hire.
2. Two distinguishing elements of the status of a common carrier:
 - a. The public nature of his business.
 - b. The extraordinary responsibility which he assumes by law for the destruction or loss of the goods, and for injuries to passengers.

II The Carrier's Liability.

1. Goods to which the liability attaches.

- a. It attaches to freight--any goods for whose carriage there is consideration.
 - (1) If one send a dangerous substance without giving notice of its character, not only is the carrier not liable for its destruction, but the sender is liable to the carrier if damage is caused to him.
- b. It attaches to baggage which is property which person in like standing with the passenger might reasonably take for the purposes of the journey.
 - (1) The samples of a travelling salesman are not baggage, and the carrier is not liable for the loss of such goods. It makes no difference that the baggage master knew that such goods were checked.
 - (2) In regard to personal effects carried by the passenger on his person or within his immediate control, the carrier is liable only for loss or destruction because of its negligence, and the passenger's contributory fault bars his recovery.

III Liability for loss or destruction of freight or baggage.

1. A carrier is liable without proof of negligence for the loss or destruction of freight or baggage; it is a quasi insurer.
 - a. Exceptions to the above rule: Not responsible if loss was caused by:
 - (1) An act of God. "An act of God may be defined as the action of an irresistible physical force not attributable in any degree to the conduct of man and not in reason preventable by human foresight, strength or care."
 - (2) The inherent vice of the goods.
 - (3) The fault of the shipper.
 - (4) Act of the public enemy.
 - (a) The public enemy must be a belligerent

force engaged in military operation in time of war.

IV Liability to passengers.

1. "It is the duty of the carrier of passengers for hire to use the highest degree of care consistent with the nature and extent of its business, not only to provide safe and suitable vehicles for their carriage, but to maintain all such reasonable arrangements for control and supervision both of the passengers and of its own servants as prudence would dictate to guard its passengers, while they occupy that relation, against all dangers that are naturally and according to the usual course of things to be expected. It is bound to select and employ a sufficient number of competent servants to meet any exigency which, in the exercise of that high degree of vigilance and care to which it is held, it ought reasonably to have anticipated. And its duty to use all proper means and precautions to protect its passengers against injuries caused by the misconduct of other passengers, such as under the circumstances might have been anticipated and could have been guarded against, is no less stringent than the obligation to prevent misconduct or negligence on the part of its own servants."
2. A carrier is liable to a person whom it is carrying over the tracks of another railroad company, or to a passenger at a station of another company which was being used by this carrier.
3. For injury to a passenger by the act of a servant, the carrier is liable if the servant is acting in the carrier's business whether the act is within the scope of the authority or not.
4. The carrier's liability for injuries to passengers caused by other passengers is founded upon negligence.

V When the carrier's liability begins.

1. As to goods.
 - a. Liability begins as soon as the goods are received under an immediate duty to put them in transit.
2. As to passengers.
 - a. With respect to railroads, elevated structures and subways, a person is deemed a passenger from the time he entered upon the premises of the carrier in a proper manner with the intention of becoming a passenger.
 - b. As to street cars operating in the public highway the rule seems to be that a person does not become a passenger until he is in physical contact with the vehicle, in the act of getting on.

VI When the carrier's liability terminates.

1. As to goods.
 - a. Generally liability continues until delivery.
 - b. Where the goods are not to be delivered personally,

- or to a designated place of business, the rule in Massachusetts is that when the goods arrive at the point of destination and are unloaded the carrier's liability ceases and the carrier is liable thereafter only for negligence as a warehouseman.
- c. Where delivery is to be made at a designated place, the liability as insurer continues until delivery or tender at that place.
 - d. If goods are being transported over connecting lines, the Massachusetts rule is that each carrier is a carrier over its own line and a forwarding agent at its terminus at which its liability as common carrier ceases; this is presumed to be the contract.
 - (1) In case of loss in shipments over connecting lines it was presumed that the loss occurred by the negligence of the last carrier.
 - e. By the interstate commerce law, the Cormack Amendment, a carrier undertakes a through shipment, so the above rule applies only in case of intrastate shipments.

2. As to passengers.

The passenger status continues until he has had an opportunity by safe and convenient means to leave the premises of the carrier.

VII Limitation of liability.

1. As to goods.

- a. In Massachusetts a common carrier may by special contract cut down the insurer's liability and may stipulate to be liable only for loss or destruction caused by negligence. A contract cutting off all liability is void as against public policy.
- b. If goods are shipped upon a stipulation that they are at an "agreed valuation" or "value asked and not given," such a stipulation is valid.
- c. A stipulation that notice shall be given and that claims for damages shall be made within a fixed time is valid if the time fixed is reasonable.
- d. If the stipulation is valid in substance and is contained in a bill of lading or other contract it is binding on the shipper whether he reads it or not.
- e. Where the stipulation is in a mere receipt or upon a voucher ticket or in a notice, the Massachusetts rule is that the shipper knew or assented to it in order to be bound.
- f. Under the interstate commerce act if a stipulation limiting liability is posted in accordance with the rules and regulations of the Interstate Commerce Commission it is binding whether the shipper knew it or not. This applies only to interstate shipments.

2. As to passengers.

a. A carrier may not exempt himself from liability for injuries caused by his negligence, if the passenger was a passenger for hire; however, if in consideration of such an agreement a passenger is permitted to ride elsewhere than where passengers are entitled ordinarily to be carried, such a stipulation is valid.

(1) G. L. Ch. 159, s. 3, prohibits a common carrier from requiring persons leaving by a particular door to do so at their own risk.

b. Where a passenger is carried free, a stipulation that there should be no liability is valid in this state.

c. The rule as to the validity of stipulation against liability in passes issued to employees is as follows: If the employee was injured during the time of his employment his rights are those of employee against employer.

(1) If the employee was injured on his own time the validity of the stipulation depends on the question whether the pass was a free pass or issued as part compensation.

VIII Innkeepers.

1. The liability of innkeepers, those who receive travellers for board and lodging, is like that of common carriers; they are liable as insurers for loss or damage to the property of guests, unless caused by an act of God, by the public enemy or by the fault of the guest except as this liability has been modified by statute.

a. G. L. Ch. 140, s. 10, as modified by the Acts of 1924.

(1) An innkeeper shall not be liable for losses sustained by a guest except of wearing apparel, articles worn or carried on the person, personal baggage and money for travelling purposes and personal use, nor for these for an amount exceeding \$500. If money, jewels, ornaments, etc., are deposited with the innkeeper, and they are lost he is liable up to \$3,000. By section 11 of G. L. Ch. 140, in case of loss by fire or overwhelming force, an innkeeper is liable only for negligence.

H. Letters for the close of all things.

I. The will--and still we speak.

Dear Sir, 1. For further consideration.

It is the anniversary of Charles Sumner's death, and I imagine it is a day very like that other day--dark, cold, with a suggestion of frost. Do you remember how they found her at the foot of the cellar stairs with the hammer, the nails, the cellar window, all bearing mute testimony that up

The boast of heraldry, the pomp of pow'r,
And all that beauty, all that wealth e'er gave,
Await alike th' inevitable hour.
The paths of glory lead but to the grave.

Gray's Elegy in a Country Churchyard.

"So surely as the berry indicates the soundness of the root, the flower of the bulb, so does man's last will tell of the goodness or foulness of the heart which conceived it. The cankered root sends up only a sickly germ, which brings forth no fruit in due season; whilst the wine that maketh glad the heart of man, the oil which maketh him a cheerful countenance, and the bread that strengthens his heart, have burst from roots which mildew has marred, nor worm fretted."

From "Curious Wills" by Harris.

Her will was carefully and well drawn. She had gone into minute directions as to the disposition of her property. Everything was taken care of from the house to the humblest contents, but there were no witnesses and it could not stand unless the next of kin were all willing to release their rights. Think of it--there were twenty-one first cousins, and all but two consented to the will. But that, you brothers, was not partly--even now must have their legal rights. It was a bit of life's irony that they had all

Requisites of a Valid Will

Dear Laura,

It is the anniversary of Bessie Shuman's death, and I imagine it is a day very like that other day--clear, cold, with a suggestion of frost. Do you remember how they found her at the foot of the cellar stairs with the hammer, the nails, the cellar window, all bearing mute testimony that up to the end she had been busy about many things?

Do you remember the two days' auction? The horror of it will ever remain. I can see that auctioneer now at the end of the second day trying to get rid of her framed Normal School diploma, I could have screamed when he tore that diploma from its frame and cast it aside. The frame went for fifteen cents. Ruthlessly that bit of paper, one of her choicest possessions, was trampled under careless feet, and why? All because she didn't know enough to have her will witnessed.

Her will was carefully and well drawn. She had gone into minute directions as to the disposition of her property. Everything was taken care of from the house to its humblest contents, but there were no witnesses and it could not stand unless the next of kin were all willing to release their rights. Think of it--there were twenty-one first cousins, and all but two consented to the will, but they, two brothers, who had rarely seen her must have their legal rights. It was a bit of life's irony that they both died

before the final disposition could be made.

I vowed years ago that if I had fifteen cents I would take care of it by will and it would be a will that would stand, an instrument signed by me and witnessed by three witnesses, no one of whom was a beneficiary or the husband or wife of a beneficiary under the will. It will not be necessary for the witnesses to know that they are witnessing a will. All they need to see will be my signature and that I'll be sure of by signing when they can see me sign and I'll be sure they sign after I do and where I can see them sign. It won't be necessary that they sign in the presence of each other for my presence only is of importance. I shall choose my witnesses with some care and be satisfied that if the world would dub me crazy after my departure that they will testify, if the need arises, to my entire sanity on the day I placed my signature on that important document--the paper which will help me a bit to live on in the minds and thoughts of those whom I have called friends.

Devotedly,

Whitney v. Twombly, 136 Mass. 145;
 Barnes v. Chase, 208 Mass. 490;
 Riggs v. Riggs, 135 Mass. 238;
 Hawkes v. Hawkes, 230 Mass. 11.

Codicils and Their Effect

Mother dear,

Nellie Ames bustled into the office the other day; and I knew that grandfather's collar button was doubtless to be left to someone else. I was right. She wanted to change "a few little items in the will." So we drew another codicil. This is the fifth. May the courts forgive me!

I told her that the next time it would have to be a new will; she really is will minded, and--a nuisance.

A codicil is all right, but any good thing can be overworked. The first time she made one was the day she announced she had just written a letter disposing of a few personal effects. I tried to explain that the letter was no good because it had been written after the execution of the will and was not mentioned in the will. She brightened up and said, "Oh, just draw the will over again," but I had no intention of giving hours to that task just then for a relative who never considers that to maintain an office requires money.

So, brightly I suggested a codicil. What was that? Oh, just a little will, signed and witnessed as any will, an instrument which brought the will down to date, and which could be used to incorporate the letter, and which revoked the will and prior codicils only so far as it stipulated. She fell for the idea at once, and she has been falling ever since.

My mind is firmly made up that the next time she comes it will cost her twenty-five dollars.

Relatives are pests sometimes, aren't they?

Devotedly,

Wainwright v. Tuckerman, 120 Mass. 232;
Brimmer v. Sohler, 1 Cush. 118;
Taft v. Stearns, 234 Mass. 273.

The Promise to Make a Will

Dear Miss White,

Mother told me last night when I got home of your recent call at the house, and of your grave problem. Unfortunately it was too late for me to drive over to see you, and I am leaving in about a half hour for Boston, and will not be down for another week. However, I'd like to get information into your hands promptly, and then, through the week, you can think the problem over, and if you still think you want my help I'll see you over the next week-end.

We have spoken of you so many times when we have seen you at Church and Grange affairs, and at the Farmers' Club with Mr. Harris. He was so feeble, and your devotion and care of him could not have been finer had you been his own daughter. We surely were all deeply shocked and surprised when we learned upon his death that everything he had was to go to a distant cousin in Connecticut. Rumor has it about town that she hardly knew him, never did for him, or in any way merits his property unless the tie of blood justifies such disposition. Time was, when people honestly believed that if they could trace a blood relationship that they were entitled to all earthly possessions, but we have travelled away from that ancient fallacy, and most of us say with reverence, "If we can't choose our relatives, thank God we can choose our friends."

Mother says that you went to Mr. Harris forty years ago, giving up the opportunity to marry and have a home of your own, because of his promise to you that if you would take care of him as long as he lived, that all that he had should be yours. Mother didn't ask you, however, if you had any writing to that effect, and I am afraid that you haven't. If you have, our pathway would be easy, and I could assure you that everything would be yours regardless of the will or the arguments of any blood relatives. Beyond question, your understanding was that he would make a will in your favor, and all the elements of a valid contract are present except one. Since May 17, 1888, such a contract to make a will to be enforceable must be in writing, and without a writing you could not succeed. On the other hand that doesn't mean that you are going to lose everything. Mother says that through the years you have not received any regular pay, that he has bought the supplies, given you a dollar now and then, or bought things for you, and that most of the money which you have had has come from working on the cranberry bog during the fall, and in screening berries in the immediate months that followed. I marvel that you were able to care for him and the house, and still earn a little on the side for yourself, but we all know that you did.

Even though you cannot sue his estate because of the broken contract to make a will, there is no reason why you cannot put in a bill for a reasonable sum each week for services rendered during the forty years. There isn't a

court in Massachusetts that would not say there was not an implied contract there on which you could recover. Have you not rendered him a benefit all of those years? Have you not rendered it expecting to be paid? Didn't he know that you expected pay sooner or later? If he didn't intend you to be paid, hasn't he been a long time silent on the subject? I know your answer is yes to every one of these four questions, and I have no hesitation in telling you that you can recover a judgment that will eat up the major portion, if not all, of his property. Why, if you were to have but \$5 a week for all you have done, that would mean \$260 a year, and for forty years there would be a debt of \$10,400. I don't know how large an estate he left, but I doubt if it exceeds \$10,000; does it?

Shall we talk this over more fully next week-end?

Sincerely yours,

Emery v. Burbank, 163 Mass. 326;
Sughrue v. Barlow, 233 Mass. 468;
Reade v. McKeague, 252 Mass. 162.

The Witness a Beneficiary

Dear Anne,

Did I dream it or did I hear you tell Grace today that you had left her in your will the opal ring she has ever admired? If I'm not mistaken, Anne, Grace was one of the witnesses to that will, and if she is, and there are but two others, she would lose the bequest. If I am right get another witness on that will.

No person can take under a will who is a witness to the will unless there are three other witnesses not similarly situated. It is also true that a husband or wife of a beneficiary who served as one of the three witnesses would prevent the other spouse from receiving under the will.

Formerly on the above facts the will would fail, and the person die intestate (without a will), but since 1921 the will is good, but the legacy is lost.

Sincerely,

Sullivan v. Sullivan, 106 Mass. 474;
Sparhawk v. Sparhawk, 10 Allen 155;
Crowell v. Tuttle, 208 Mass. 445.

The Will Revoked

Dear Mrs. Vickery,

You write me that conditions have changed and you think it wise to do without a will, and to let your property go to your next of kin. That is an easy thing to do.

The will may be revoked by "burning, tearing, cancelling, or obliterating" with the intent to revoke it. Burn it up, tear it up, write "cancelled" across its face, or scratch out your signatures and the signatures of the witnesses and ipso facto the desire is accomplished.

There are other ways provided in the statute, but they do not apply to your case, so I hasten to send this note to you, that you may destroy the will and forget that you ever had one.

Truly yours,

Perkes v. Perkes, 3 Barnswall & Adolphus 489;
 Burton v. Wylde, 261 Ill. 397;
 Bailey v. Bailey, 5 Cush. 245;
 Meyerovitz v. Jacobovitz, 263 Mass. 47.

Marriage and the Will

Dear Margaret,

Your letter today telling me that you made a will before marriage startles me. Unless that will recites that you made it in contemplation of your marriage to Mr. Mortimor, it is no earthly good, for it was revoked by your marriage.

I know that you have property you want to dispose of, and I am writing because I feel that you may care now to make a will. With Junior and Hope to think of, I imagine that a new will would be more satisfactory anyway.

A woman asked the other day if she could cut off her husband in her will, and I had to tell her that that was not possible, but if she chose to cut off her children she might. Imagine, Margaret, wanting to cut off one's husband and youngsters.

If a child is left out of a will there is a presumption that he has been forgotten, and unless the presumption is overruled, he takes the same share he would have taken had the parent died without a will. There are places where a child would rejoice in being cut off.

A recent case arose in which the black sheep of the family claimed he had been overlooked in his mother's will, but evidence was introduced that his picture had hung over his mother's dressing table for twenty-three years--and it was decided that he was not forgotten.

The old idea that a child must be left a dollar, is erroneous, but it is wise to mention him and thus negative

the idea that he may have been forgotten.

This is really an interesting subject, but I must not write longer.

Good night,

In re: Steiner's will, 152 N. Y. Sup. 725;
Ingersoll v. Hopkinson, 170 Mass. 401;
Paine v. Price, 184 Mass. 350;
Yerxa v. Youngman, 241 Mass. 251.

If a man leaves a will where there are no children, and the wife desires to waive it, she figures the amount owing to her by thinking in terms of the first \$10,000 principal, and one-half the remainder; e.g., an estate of \$15,000 means \$5,000 plus \$5,000 for her, or a total of \$10,000. But again, of that she can take the first \$10,000 principal and the interest in the balance, in this case, \$5,000.

Do you still feel that you are to exercise your rights?

Respectfully yours,

Barbara V. Steiner, 405 West 40th St.
New York 18, N.Y.

The Widow Who Objects to Her Husband's Will

Dear Mrs. Grey,

It is possible for you to waive your husband's will and to obtain a maximum amount of \$10,000 outright, and a life interest in \$5,000 more. Mr. Grey's estate of \$45,000 above expenses would have descended one-third to you, and two-thirds to his children had he died without a will, so your share would have been \$15,000, but of that you can only take \$10,000 in your own right. The will which left the estate to charity will be cut down by \$10,000, and from \$5000 more you will have the interest, but after your death, the \$5,000 will pass to the designated charity. The boys, unfortunately, inasmuch as they are mentioned in the will, have no additional right.

If a man leaves a will where there are no children, and the wife desires to waive it, she figures the amount coming to her by thinking in terms of the first five thousand, and one-half the remainder: e.g. an estate of \$45,000 means \$5,000 plus \$20,000 for her, or a total of \$25,000. But again, of that sum she only takes the first \$10,000 outright and the interest in the balance, in this case, \$15,000.

Do you still feel that you care to exercise your right?

Respectfully yours,

Boynton v. Boynton, 266 Mass. 454;
Pinkerton v. Sargent, 102 Mass. 568;

If the Beneficiary Predeceases the Testator

Dear Jack,

Your mother was to have been a beneficiary under her aunt's will, and the aunt has but recently passed away. Jack, the \$2,000 comes to you, and I am so happy for you, because I know to what good use you will put it. It will solve the educational worries under which you have been so courageously struggling. I know that even yet you don't believe your good fortune.

There is a statute in Massachusetts which provides that in case a legatee predeceases a testator, as where your mother passed on before this great-aunt, that if the legatee was a blood relative having issue, that the issue will take the share bequeathed to the legatee, but if the legatee is not a blood relation, or if a blood relation she does not have issue, then her share lapses. By that I mean it will fall into the rest and residue clause if there is one in the will, or if not, it will go as intestate property to the next of kin of the deceased person.

Your mother was a blood relative, you are her issue; therefore, the \$2,000 comes to you and I rejoice in your having it.

Sincerely yours,

Galloupe v. Blake, 248 Mass. 196.

Concerning Bills Owed by Deceased Persons

Dear Laura,

Your letter telling me of the unfortunate situation in which your aunt finds herself makes me wish so much that I could help.

You write that her brother borrowed \$2500 of her two years before his death, that he died in October 1928, that his wife was appointed executrix under his will the following month; and that she constantly promised to meet the obligation and never did.

Dear lady, I am sorry, but we have a law in Massachusetts that a creditor who has a claim against the estate of a deceased must start suit within one year from the date of the appointment of the executor, or be forever barred.

There is only one chance, and I will investigate that one when I come to Boston, but I imagine it is worthless. If by any slip the executrix failed to publish or post the notice of her appointment as required by the court, then creditors would be able to assert rights for a period of twenty years after the date of the appointment. This is the only hope. I wonder if the court orders had not been carried out so that rights still exist if any property could be discovered with which to meet the obligation. These are things which make one furious.

Regretfully yours,

**Wells v. Child, 12 Allen 333;
Leach v. Leach, 238 Mass. 100;
Modified by Statute of 1933.**

Without a Will

Dear Frances,

Whether one shall make a will or not is to be determined by those who would take his property upon his decease. While your mother lived, I told you not to make a will, for I knew that if you predeceased her, you would want her to have everything, and without a will she would get it as your next of kin. On the other hand, if you had made a will and not remembered the sister and your deceased brother's child, it would have hurt perhaps.

Today you should make a will. For with your mother's passing, Louise and Leonard's son are your next of kin, but inasmuch as you don't want the property to go to that son, you can only take care of the situation by a will.

If a man is married and without children, he makes a great mistake not to make a will, for if he has next of kin then after the first five thousand dollars which goes to his wife, one-half the remainder would go to that individual, no matter how far removed he was, and the other half to the wife. It does not seem fair to the surviving spouse.

It is wise for every person to think through his situation, to know as far as possible where his property would go, and then to act accordingly.

Let's take care of your situation right away. None of us will die any sooner because of the will.

Lovingly,

General Laws (Ter. Ed.) Ch. 190, s.1-3.

THE WILL

A. General Information.I Requisites of a Valid Will.

1. Testator must be of full age--the day before the 21st birthday satisfies this requirement.
2. Testator must be possessed of a sound mind and not subject to undue influence.
 - a. A person has testamentary capacity who understands that a will is a disposition of property to take effect after death, and who is capable of remembering generally his property and the objects of his bounty.
 - (1) The mere fact that a person suffers from insane delusions does not as a matter of law deprive him of the power to make a will; it is only when the insane delusions affect the manner in which he disposes of his property that he is deprived of testamentary capacity.
 - b. A person has the right to make a will which is contrary to the principles of justice and humanity, unnatural and unjust, and as long as it appears to be the expression of a sound mind the court must uphold it.
 - c. The proponent of the will must allege and prove soundness of mind in Massachusetts. If there is no contest there is a presumption that the testator was of sound mind and all that is required is the proof of due execution by the evidence of one witness.
 - d. A will obtained by undue influence is not valid.
 - (1) The burden of proof on the issue of undue influence is on the person alleging it.
 - (2) Mere solicitation, persuasion, or appeals to the testator's judgment or affections do not amount to undue influence.
3. Testator must be possessed of testamentary intent at the time of the execution of the will.
 - a. The animus testandi must exist either at the time the will is signed or at the time it is acknowledged in the presence of the witnesses.
 - b. Parol evidence is admissible to show that the will was made without testamentary intent.
4. There must be legal execution of an instrument in writing.
 - a. It must be signed by the testator, or by a person in his presence and at his direction.
 - (1) It is not necessary that the witnesses know the instrument to be a will.
 - (2) The signature of the testator must be visible whether seen or not by the witnesses.
 - (3) It is not necessary that the witnesses should see the testator sign, nor is it necessary that they should sign in the presence of each other.

- (4) It is necessary that the testator intend that the will, his signature to which is witnessed, shall take effect as a will when it is subscribed to by each of the three witnesses.

II Competency of Witnesses. Any person of sufficient understanding shall be deemed to be a competent witness to a will, notwithstanding any common law disqualification for interest or otherwise; but a beneficial devise or legacy to a subscribing witness or to the husband or wife of such subscribing witness shall be void unless there are three other subscribing witnesses who are not similarly benefited thereunder.

1. The competency of a witness is determined as of the time of his attestation of the will; if he later becomes incompetent the will would not be affected.
2. Under the Statute any one who receives a beneficial devise or legacy under a will is a competent witness but such legacy or devise fails. Apparently the husband or wife of such a beneficiary is a competent witness and likewise the gift will fail.

III Miscellaneous Information.

1. Property disposed of by will.

- a. All real and personal property which would descend to heirs and next of kin in case the individual died intestate.
- b. Land or other property acquired after a will is made will pass under the will unless a different intention is plainly manifested.

2. Contract to make a will.

- a. A contract to make a will must be evidenced by a writing to satisfy the Statute of Frauds. G. L. Ch. 259, s. 5.

3. Incorporation by reference.

- a. One may incorporate into his will by reference any other existing document, but in order to accomplish this result the will
 - (1) Must refer to the document in question in clear terms as an existing document, and
 - (2) The document must have been in existence at the time of the execution of the will.
- b. Oral instructions cannot be incorporated into a will.

IV Revocation of a Will. No will shall be revoked except by burning, tearing, cancelling, or obliterating it with the intention of revoking it by the testator himself or by some person in his presence and by his direction; or by some other writing signed, attested and subscribed in the same manner as a will; or by subsequent changes in the condition or circumstances of the testator from which a revocation is implied by law. G. L. Ch. 191, s. 8.

1. Note that there are three general ways in which a will may be revoked:

- a. By destruction--burning, tearing, cancelling, or obliterating.
- b. By a subsequent writing executed in the same manner as a will.
- c. By a subsequent change in the condition or circumstances of the testator from which a revocation is implied by law.

2. By destruction.

- a. If the testator changed his intention to revoke before completing the act of mutilation to the extent and in the manner originally intended, the will is not revoked.
- b. The destruction of a will due to a mistake of fact will not operate as a revocation, because lack of intent to revoke.
- c. If the testator requests another to destroy his will and the other fraudulently pretends that he has done so, there is no revocation.

3. By a subsequent writing.

- a. If the revocation is accomplished by a subsequent instrument in writing, the statute requires it to be signed, attested and subscribed in the same manner as a will.
- b. A Codicil.
 - (1) The most common form of such a subsequent writing is a codicil.
 - (2) A codicil revokes a will only so far as it expressly does so or by necessary implication.
 - (3) A valid codicil will reaffirm and republish a void will as of the date of the execution of the codicil, but in order to reaffirm and republish a previous void codicil it must expressly refer to such codicil.

4. By a subsequent change in condition or circumstances.

- a. The marriage of a person shall act as a revocation of a will made by him previous to such marriage, unless it appears from the will that it was made in contemplation of such marriage. G. L. Ch. 191, s. 9.
- b. By statute, if a testator omits to provide in his will for any of his children or for the issue of a deceased child they take the same share of his estate which they would have taken if he had died intestate unless
 - (1) They have been provided for by the testator during his lifetime, or unless
 - (2) It appears that the omission was intentional.
 - (3) Children born after the will was made have the benefit of this statute. Their omission operates as a pro tanto revocation of the will.
 - (a) Illegitimate children do not come within the statute providing for omitted children

in a will.

(A) Illegitimate children inherit from the mother and any of the maternal ancestors, but not from brothers and sisters who are legitimate children of the mother, or from the mother's collateral kindred.

(4) Adopted children have a double inheritance, inheriting through the natural parents and kindred and also from adopting parents and stand in the same relation to their legal descendants, but to no other of the kindred; e. g., the adopted daughter inherits from the son of the adopting parents.

c. A decree of divorce and settlement constitutes an implied revocation of wills theretofore made.

V Legacies and Devises Defined:

1. General legacies.

a. A general legacy is one payable out of the general assets of the estate. A residuary clause is considered as a general legacy or devise.

2. Specific legacies.

a. A gift of some definite, specific thing capable of being designated and identified.

3. Demonstrative legacies.

a. One of a certain amount or quantity, the particular fund or property being pointed out from which it is to be taken or paid. It is a general legacy from a specific fund or from a specific lot of personal property. If the fund or property disappears or is inadequate, the legacy, being general, is payable out of the general estate of the testator.

VI Lapsed legacies.

1. At common law if a legatee or devisee predeceased the testator the legacy or devise lapsed.

2. By statute if a devise or legacy is made to a child or other relation of the testator, who dies before the testator, but leaves issue surviving the testator, such issue shall, unless a different disposition is made or required by the will, take the same estate which the person whose issue they are would have taken if he had survived the testator.

a. Neither a brother-in-law, step-son, nor a wife is such a relation.

b. If a legacy is given to a number of persons as a class, and not named as individuals, and they are not relations of the testator, the surviving members of the class take the whole gift in case of the death of one.

c. But if the gift is given to them as named individuals, and they are not relations, the share of the

deceased lapses.

- d. The general rule is that lapsed legacies and devises fall into the residue, but if there is no residuary clause, the lapsed gift will be disposed of as intestate estate. Likewise, if a residuary devise or legacy lapses, the residue will be disposed of as intestate property.

VII Construction of Wills.

1. The cardinal rule in the interpretation of wills, to which all other rules must bend, is that the intention of the testator shall prevail, provided that it is consistent with the rules of law.
2. The presumption is that a will speaks from the death of the testator.
3. Where two parts of a will are irreconcilable, a clear and unambiguous provision, coming later in the will, controls, as being more likely to express the final intention of the testator.

I Miscellaneous Letters.

The fundamental basis for the need and the operation of Courts and the practice in them is age old. In the 16th Century, St. Germaine, the notable writer said--in addressing those about to embark upon the sea of opportunity in the law--

"As a light is set in a lantern, that all that is in the house may be seen thereby; so Almighty God hath set conscience in the midst of every reasonable soul, as a light whereby he may derive and know what he ought to do. Wherefor as much as it behooveth thee to be occupied in such things as pertain to the law, it is necessary that thou ever hold a pure and clean conscience. And I counsel thee that thou love that which is good, and fly from that which is evil, that thou do to another as thou wouldst should be done to thee; that thou do nothing against truth; that thou live peaceably with thy neighbor; that thou do justice to every man, as much as in thee is, and also that in every general rule of the law thou do observe and keep equity. And if thou do thus, I trust the lantern, that is thy conscience shall never be extincted."

That doctrine is as sound today, as it was in the 16th Century.

A lawyer must know everything. He must know law, history, philosophy, human nature, and if he covets the form of an advocate he must drink of all the springs of literature, giving ease and elegance to the mind and illustrations to whatever subject he touches.

Charles Sumner.

When We Have a Right to a Jury Trial.

Dear Walter:

You surely have a new experience ahead of you if you are going to serve on the Plymouth County jury for the first time. I think that it will be an experience which you will not soon forget and I hope that you will come away with the feeling that law after all isn't wholly crooked and that jury service ought not to be a farce. There is a good deal of discussion today about doing away with the jury and I am not at all sure but that the tendency is in that direction.

Jury service is a very ancient institution which, with the passing of the Constitution of Clarendon in the reign of Henry II, began in England in 1164. Even at that time a jury consisted of twelve men, but the juries of that day might well be designated as neighborly juries, that is, men were selected who knew the parties and the situation involved in the case. It was their duty to go out into the countryside to discover the unknown facts.

For centuries witnesses were not used in trials, and if a man should come forward with a desire to testify in behalf of the plaintiff or defendant he would find himself indicted for the crime of maintenance. In an old Year Book written in the reign of Henry VI there is a statement made by one of the Judges that "If a man comes into court out of his own head to testify he shall be found guilty of maintenance and punished for it." It was not until the reign

of Elizabeth in 1563 that witnesses in the modern sense could be summoned into court, and with her reign the jury began to take on a more modern character.

Many people feel that there is a Constitutional provision which permits to every person the right of jury trial. That is not so. Our Constitution grants a jury trial only in cases of Federal crimes, and in the Declaration of Rights which accompanies the Massachusetts Constitution there is a provision that in all cases not otherwise provided for there shall be a right of jury trial. However, in our courts of Equity there is still no absolute right to a trial by jury. In most cases it is granted only in the discretion of the judge because of the development of Equity through the ages. The first Equity Courts were presided over by the Chancellor of the Exchequer who was known as the keeper of the King's conscience. You can appreciate that to have twelve men and true sitting on the conscience of the King is ridiculous, so to this day a jury trial is not to be found in Equity courts except upon those issues brought into the Equity court from the common law court, and in issues where, in the discretion of the judge, a jury trial would be more equitable.

Our Superior court, into which you are going, is the great court of jury trial. As you know, there is no jury in the inferior courts, but the man does not have to start his case there, and the defendant can always ask to

have the case removed to the Superior Court in order that he may have the advantage of a jury. Juries find the facts in the case and link up the facts with the law as it is stated to them by the court. Inasmuch as the Supreme court handles only questions of law and not of fact, it follows again that there is no jury in the Supreme court.

Today, unless the Plaintiff and Defendant ask for a jury trial in the Superior court it is not granted, and an individual is held to have waived his right to jury trial by failing to ask for it.

I think you are going to have a very interesting experience. Personally, I believe that women should sit upon juries as well as men and I think there is a duty on our public school systems to inspire the growing young to a desire to serve his community by impartial, honest, upright, jury service. To be called upon the jury should be considered an honor and a challenge to one's integrity and character, and our schools should tremendously encourage this feeling. I shall be very much interested in your reaction.

Truly yours,

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Truly yours,

Privileges Accorded to Witnesses.

Dear Mr. White:

You are certainly learning some law with your jury experience. So you were surprised to know that conversation between husband and wife cannot be revealed in court? That is correct. So many times in court I have seen an attorney question a wife as to what her husband told her on a given occasion and have seen the judge interrupt to ask her if some one had been present during the conversation. If her reply is in the affirmative she is allowed to give the conversation, otherwise, it is excluded.

There are certain witnesses who, under some conditions, are privileged. There is an absolute privilege as to private conversation between a husband and wife, and even though both parties should desire to reveal the conversation it is not permitted unless there was some third person present who really understood and was paying attention to the conversation. We have several cases where husband and wife have talked in the presence of children and the conversations have been admitted on the ground that the children were old enough to pay attention to the conversation and to be interested in it. A similar situation has arisen where men and their wives have been talking in public places, as for example in depots, in tones loud enough to attract the attention of other people in the station, under which circumstances their conversation ceases to be private and can

be revealed.

To the rule that private conversation of husband and wife cannot be admitted there is one exception, and that arises when there is a criminal action for non-support or desertion in which case the wife can testify as to what the husband said at the time he left, to establish the fact that the desertion was intentional and wilful. It is also true that even in civil cases either may testify as to what he or she did because of a conversation with the other, although they must not reveal the exact words of the conversation. It is interesting to note that epithets and abusive terms are not considered conversation, and can be revealed on the witness stand. This is only one of the many interesting privileges which through the ages have been accorded to witnesses. Watch for others during your work and we will discuss them more at length if you care to do so.

Ever yours,

Com. v. Terengo, 234 Mass. 56;
Linnell v. Linnell, 249 Mass. 51;
Freeman v. Freeman, 238 Mass. 150.

be revealed.

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Ever yours,

Don. V. Forester, 544 Mass. 58;
Linnell v. Linnell, 548 Mass. 51;
Freeman v. Freeman, 558 Mass. 150.

J Letters to my Co-Workers.

Let reverence for the law be breathed by every American mother to the lisping babe that prattles on her lap. Let it be taught in schools, in seminaries, and in colleges. Let it be written in primers, spelling books, and in almanacs. Let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice. And, in short, let it become the political religion of the Nation.

Abraham Lincoln.

The Attitude of the Teacher.

Dear teacher who dreads the subject:

Is not the first requisite of success, faith in one's subject and faith in one's ability to make that subject vital to others? To have such faith, one must believe in the importance of his work and be fired with enthusiasm. Emerson has truly said that nothing great is ever achieved without that spark of celestial fire. Is it possible to be enthusiastic if one is teaching law? Decidedly, yes.

Its very antiquity makes it honorable. Become steeped in its background, tell your students the stories of its beginning. Common law, equity law, the story of the law merchant, modern statutory law--it is a story filled with romance and adventure, and there is no high school youth who cannot be fired to loyalty by its rehearsal. Show that after all, law is but crystallized public opinion, that it was unnecessary as long as Robinson Crusoe was on his lonely isle, but that as soon as his man Friday appeared its need was apparent. Don't let your student feel that laws are the weapons of the oppressors, to be broken as speedily as possible; show them that lawmaking is the gift of the ages, a sacred torch which they must carry on. It has been said that where there is no vision the people perish; well might it be said that when there ceases to be respect for law and order a nation's history is written.

We are living in an age when crime is rampant, when chicanery and graft face us on every hand, and the hope of

America lies in the youth of today, the men and women of tomorrow.

Unless teachers guide aright where can we expect leadership? I don't believe that we are going to the dogs, and I do believe that the heart of civilization is still beating vigorously, that its feet are still marching on and up, and all this in spite of the newspapers which picture muck and filth and crime on every hand. But every teacher of law who takes the subject as a sacred gift and unites with its teaching, character, may play a part in bringing the brighter day more quickly and in salvaging individual lives which otherwise may be sacrificed in the march. Take your law class and yourself on a pilgrimage.

Enthusiastically yours,

Mental Discipline Through the Study of Law.

Dear teacher who would read further:

Yesterday, I tried to make you enthusiastic in my field but there are other things I would give you.

Not only will your enthusiasm lead you to tell your classes the story of early beginnings, but you will show them and your co-workers that here is a subject which leads in mental discipline. We were brought up on the belief that geometry and advanced mathematics taught us reasoning power, logical development, in short how to think--a tremendous need in superficial thinking America.

You are familiar perhaps with the Dippy Dicky pictures in the Boston Globe. Some years ago Blondy found his friend Dicky the picture of despair and he asked him the cause of his depression. Dicky informed his friend that for the sixth time he had received word that he had failed to pass the Massachusetts Bar Examinations. "What can be the matter?" asked Blondy, "I can't think," replied Dicky, and with light dawning Blondy replied, "I guess that is right." What a picture that is of our American people! We either can't think or don't think. All honor to any subject which will help the American need, but why must it be an abstract subject like solid geometry? Why might it not be a subject which will give us definite knowledge of our rights, duties and liabilities, knowledge which may save us money and heartaches in the years to come.

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On a certain tombstone in Plymouth County appear the words:

Here lyeth one, deny it if you can
Who, tho a lawyer, was an honest man,
Heaven's gate to him is open wide
But shut, alas, to all the tribe beside.

Why do we laugh? Because we at once recognize a common truth. But after all, why are certain lawyers able to take advantage of their clients? Because in this particular field, men and women are as babes in arms. They sign papers without reading their contents; they are ruled by sentiment in this field rather than by reason. Yet, there is nothing difficult in this subject. Outstanding material may be given freely and understandingly to our young people, and they, and through them their homes and their friends can be protected. Let knowledge grow in this field from more to more. And let me tell you something else; at the same time your students are gaining in practical, everyday knowledge which will protect them not only in business, but in their social and home contacts they are learning to think straight, to travel from point A to B. and then to C, a training as invaluable as that gained in the mathematics class and one much more practical.

For girls, this training is doubly desirable. Women are always said to be intuitive. Is it not true that frequently the girl gets the answer before the boy? But isn't it also true that she is covered with confusion if she is asked to give reasons for the hope that was within. Law

leads as no other subject leads in clean-cut thinking, in the development of an orderly mind, in the choice of an exact vocabulary.

Some years ago I served on a committee whose Chairman was an English professor, a graduate of Oxford, a man whom I much admired, but I shall never forget the surprise I felt when I heard him read the report of the committee's work. Frankly, I felt as if I were listening to a recital of accomplishments in which I had had no part. Was he a member of the Ananias Club? After a time light dawned, the report was the result of his training, an imaginative mind let loose in the field of expression. He should have studied law!

Continued in our next,

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Ethics Taught Through Law.

Dear serious teacher:

Again law is a worthy subject to present to the youth of America for its correct teaching will give much of ethics and character building and in the present reactionary age its importance cannot be too greatly stressed. In the year of 1919 I was teaching in a nearby high school. Law had been discontinued and I was told that the instructor who had then departed had used the course to develop a training school in crime. He had told the youth of that high school of the paternal attitude of the law for youth and had told it in such a fashion that boys had gone forth to practice his teachings, and so well had they done it that the merchants of the community had risen in arms.

The rights of infants to avoid contracts can be taught to bring about just such a result as this, or it can be taught in such a way as to give youth reverence for a state which cares to safeguard its minors; it can be taught so as to arouse in that youth a hatred for a person so small and contemptible as to break faith with the state and to use the protection for purely selfish ends.

Once more law training has a financial value. It teaches an individual to recognize when he has a legal problem and to appreciate the old adage, "He who has himself for a lawyer has a fool for a client." It prepares for the increased pay envelope and the position higher up. Those of

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you who are teachers of law will recall the case involving the Maryland Fire Insurance Company in which, if the stenographer had known enough law to have written "Upon receipt of your check your premises will be covered," she would have saved her concern many thousands of dollars, and might she not have aided herself financially?

Lastly, the study of law has an educational and cultural value. Bring this thought home to your colleagues in the classical department who sometimes have the impression that "Wisdom alone doth dwell with us."

For that attitude we are somewhat to blame. Omit the word "Commercial." "Commercial" is a word long associated with inferiority, and I am delighted to see it disappearing. The omission of it is going to make possible the subject taking its rightful place throughout all departments. Does the boy who is to be the preacher, the teacher, or the doctor need a working knowledge of the law less than the business executive? Does the girl who is to be a homemaker need it less than the girl in the office or in the factory? That is ridiculous. There are those who believe it should be taught to boys, but not to girls. Those people are fifty years behind the times. Don't they know that women buy eighty-five per cent of all the goods that are bought in America and that therefore eighty-five per cent of the sales contracts are entered into by women alone. Think it over.

All these points I would share with my students early in the course. I must have their enthusiasm to add to mine if I am to make "the iron to swim." Here is a subject that gives a wealth of background, which prepares for statesmanship and the handling of national problems. If the attitude of my teacher of law is right, more than half my battle is won, for with the right spirit and the will to do and venture, new methods will open up.

More anon,

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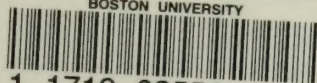
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